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LOVELAND'S FORMS OF
FEDERAL PROCEDURE

RIGHTMIRE'S EDITION

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Annotated Forms of Federal Procedure

Compiled, Arranged and Annotated

By

FRANK O. LOVELAND

(Clerk United States Circuit Court of Appeals for the Sixth Circuit;
Author of Loveland on Bankruptcy and Loveland on
Appellate Jurisdiction of the Federal Courts)

Third Edition, Revised and Enlarged

By

GEORGE W. RIGHTMIRE

(Of the Columbus, Ohio, Bar, and Professor of Law in the
College of Law of the Ohio State University; Author of
Rightmire's Cases on the Jurisdiction and
Procedure of the Federal Courts)

THREE VOLUMES
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Jurisdiction of Appellate Courts—Preliminary Statement.

The Appellate Courts in the Federal System are the Supreme Court, the several Circuit Courts of Appeals, the Court of Customs Appeals, and the District of Columbia Court of Appeals.

The methods of procedure by which a judgment or decree of an inferior court may be reviewed by an appellate court with power to affirm, reverse or modify the same are as follows:

First. By writ of error to remove a case from

- a—District Court to a Circuit Court of Appeals. 36 Stat. L. 1133, Judicial Code, Sec. 128.
- b—District Court to the Supreme Court. 36 Stat. L. 1157, Judicial Code, Sec. 238.
- c—Circuit Court of Appeals to the Supreme Court. 36 Stat. L. 1157, Judicial Code, Sec. 241.
- d—The highest court of a state to the Supreme Court. 36 Stat. L. 1156, Judicial Code, Sec. 237.

second. By appeal from

- a—District Court to the Circuit Court of Appeals. 36 Stat. L. 1133, Judicial Code Sec. 128, and the Bankruptcy Act of 1898, Sec. 25, 30 Stat. L. 544.
- b—District Court to the Supreme Court. 36 Stat. L. 1157, Judicial Code, Sec. 238.
- c—Circuit Court of Appeals to the Supreme Court. 36 Stat. L. 1157, Judicial Code, Sec. 241.
- d—Board of General Appraisers to the Court of Customs Appeals. 36 Stat. L. 1145, Judicial Code, Sec. 195.

Third. On writ of certiorari from the Supreme Court

a—To Circuit Court of Appeals. 36 Stat. L. 1157, Judicial Code, Sec. 240.

b—To highest court of a state. 38 Stat. L. 790, 39 Stat. L. 726, both amending Judicial Code, Sec. 237.

Fourth. On certificate of questions to the Supreme Court by a Circuit Court of Appeals. 36 Stat. L. 1157, Judicial Code, Sec. 239.

Fifth. On petition to review an order of a court of Bankruptcy in a Circuit Court of Appeals. Bankruptcy Act of 1898, Sec. 24b, 30 Stat. L. 553.

It is sometimes difficult to determine whether a case should be removed to the Circuit Court of Appeals or to the Supreme Court; it can not be tried on its merits as a matter of right in both courts at the same time. *Robinson v. Caldwell*, 165 U. S. 359; *Columbus Construction Co. v. Crane*, 174 U. S. 600.

The question has been before the courts at various times involving various states of facts and pleadings, and rather definite rules may be deduced from the cases governing this matter. When the jurisdiction of the trial court (District Court) is invoked solely on the ground of diversity of citizenship, two classes of cases may arise:

1. In which the questions expressed in Judicial Code, Sec. 238 (Sec. 5 of the Act of 1891), appear in the course of the proceedings; such cases may be taken directly on error or appeal to the Supreme Court (*Loeb v. Columbia Township*, 179 U. S. 472), or they may be taken to the Circuit Court of Appeals. If taken to the latter, they can not then be taken to the Supreme Court as matter of right. *Huguley Mfg. Co. v. Galeson Cotton Mills*, 184 U. S. 290.

2. In which other federal questions than those expressed in Judicial Code, Sec. 238, appear; these must be taken to the Circuit Court of Appeals, and its judgment is final. *Ayers v. Polsdorfer*, 187 U. S. 585; *Colorado Mining Co. v. Turck*, 150 U. S. 138.

But if a case arises under a law of the United States and the question of the constitutionality of such law is also raised from the outset by the plaintiff, the case may be appealed to the Circuit Court of Appeals, and from there as a matter of right to the Supreme Court on error or appeal. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

But where a case arises only under the laws of the United States, although constitutional questions arise during the further proceedings, if the case is appealed to the Circuit Court of Appeals the decision there is final, under Judicial Code, Sec. 128 (Sec. 6 of the Act of 1891). *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427.

On this question generally see further the cases: *Standard Paving Co. v. Trinidad Asphalt Co.*, 220 U. S. 446; *Brown v. Alton Water Co.*, 222 U. S. 325, 56 L. ed. 221; *Morrisdale Coal Co. v. Penn. R. Co.*, 183 Fed. 929, 106 C. C. A. 269; *Boise Artesian Hot Water Co. v. Boise City*, 230 U. S. 98, 57 L. ed. 1409; and the illuminating opinion in *U. S. v. Jahn*, 155 U. S. 109.

In some cases it has been held that if the construction or application of the Constitution of the United States is the controlling factor, a direct appeal lies to the Supreme Court; but if the case is taken to the Circuit Court of Appeals, the latter may decide the whole case, or may certify the constitutional questions and afterwards proceed to judgment. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68; *Benjamin v. New Orleans*, 169 U. S. 161; *Carter v. Roberts*, 177 U. S. 496.

The following outline of the Appellate Jurisdiction of the principal Federal courts will be suggestive and is believed to cover the cases which have arisen:

A. Supreme Court.

I. From District Court.

1. Exclusive where jurisdiction rests only on the ground of
 - a. Being a case of prize.
 - b. Being a case involving the construction or application of the federal constitution.
 - c. Being a case involving constitutionality of a federal law or the construction or validity of a treaty.
 - d. Being a case in which the constitution or law of a state is claimed to be in contravention of the federal constitution.
2. Not exclusive
 - a. Where jurisdiction is based on diversity of citizenship and questions a, b, c or d above arise during the litigation, the case may be taken to the Supreme Court or to the Circuit Court of Appeals, but can not as a matter of right be taken from the latter to the Supreme Court.
 - b. Where jurisdiction is based, both on diversity of citizenship and a federal question, the case may be taken either to the Supreme Court or the Circuit Court of Appeals, and if to the latter it may thence as matter of right be taken to the Supreme Court.
3. The question whether the District Court has jurisdiction may alone be certified to the Supreme Court.
4. In all cases taken directly to the Supreme Court, except where the question of jurisdiction alone is certified, the Supreme Court determines the whole case.

A. Supreme Court—Continued.**II. From Circuit Court of Appeals.**

1. By appeal or writ of error
 - a. In cases not made final involving more than \$1,000.
 - b. Where jurisdiction is in the bill of complaint based on diversity of citizenship and a federal question.
2. By certification of a question of law.
3. By ordering up whole record where a question of law has been certified.
4. By writ of certiorari in a case made final.

B. Circuit Court of Appeals.

1. Cases made final therein.
2. Cases where jurisdiction of District Court is based only on diversity, and during litigation questions under a, b, c or d (see A-1-1 above) enter, may go to Supreme Court or Circuit Court of Appeals.
3. Cases like 2, but federal questions other than those under a, b, c or d enter, must go to Circuit Court of Appeals.
4. Cases where question of jurisdiction is raised and District Court claims jurisdiction and proceeds to judgment, may be taken to Circuit Court of Appeals, which may, in its discretion certify question of jurisdiction over to Supreme Court.

C. To both Circuit Court of Appeals and Supreme Court.

- a. To Supreme Court on question of jurisdiction and Circuit Court of Appeals on other questions, latter suspending action until Supreme Court decides, but Supreme Court will not entertain question of jurisdiction if case first taken to Circuit Court of Appeals.

Prior to the enactment of the Judicial Code in 1911, these questions of appellate jurisdiction involved generally Secs. 5 and 6 of the Act of 1891, creating the Circuit Court of Appeals. These sections in great part were brought forward in the Judicial Code, Secs. 128 and 238, and the cases after 1912 turn on the application thereof.

But inasmuch as the earlier statute contained in very similar language the Judicial Code sections mentioned, cases decided upon the earlier statute are highly pertinent and are constantly cited in cases arising under the Judicial Code. Likewise treatises written prior to 1912 are still valuable, and attention is here called to the painstaking and thorough treatises.

tise on Appellate Jurisdiction of the Federal Courts, by Loveland, which was published in the same year the Judicial Code was enacted. See pages 1 to 42 thereof, and elsewhere on occasion.

REVIEW IN THE SUPREME COURT.

By Sec. 238 of the Judicial Code the Supreme Court may review certain classes of cases directly from the District Courts, and this provision is taken from the Act of March 3, 1891, Sec. 5, except that criminal cases go now to the Circuit Court of Appeals, and the District Court of Porto Rico is included. The various statutes relating to Porto Rico, the Danish West Indian Islands, the Canal Zone, and Alaska should be consulted for details as to appeals and writs of error to and by the Supreme Court and the Circuit Courts of Appeals.

By Sec. 128 of the Judicial Code certain classes of cases are finally decided by the Circuit Courts of Appeals, and the list found therein has been from time to time enlarged over the statement in the Act of 1891 until now the trade mark laws and the copyright laws are included.

There are three classes of cases which may go from the Circuit Court of Appeals to the Supreme Court, namely, those which are not made final therein, see Judicial Code, Sec. 241; those which by Sec. 239 may be certified in the form of questions of law, and those which by Sec. 240 may be taken over under writs of certiorari.

Appeals may be taken from the Court of Claims to the Supreme Court under Judicial Code, Sec. 242. As to appeal and error from Hawaii, and Porto Rico, see Sec. 238; for Alaska see Sec. 247; for the Philippine Islands see Sec. 27 of the Act of August 29, 1916, 39 Stat. L. 555, and cutting down the review to certiorari alone see Sec. 5 of the Act of September 6, 1916, 39 Stat. L. 728. For the District of Columbia, see Judicial Code, Secs. 250 and 251. For Bankruptcy, see Sec. 3 of Act of September 6, 1916, 39 Stat. L.

727, making decisions of Circuit Court of Appeals final, except that the Supreme Court may take over the case by certiorari.

In addition to the above the Supreme Court may, by the provisions of Judicial Code, Sec. 237, as amended by Act of September 6, 1916, review the final decrees or judgments of state courts mentioned on writ of error, or in certain cases by certiorari.

It should be noted also that the appellate jurisdiction of the Supreme Court is narrowed further by the Act of September 6, 1916, 39 Stat. L. 727, wherein the judgments and decrees of the Circuit Court of Appeals are made final under Federal Employers' Liability Act, Hours of Service Act, Safety Appliance Act, and their various amendments and supplements.

Appeals and writs of error from the Court of Appeals of the District of Columbia are provided for by Judicial Code, Sec. 250; certiorari by Sec. 251.

Under the Act of October 22, 1913, 38 Stat. L. 219, appeals direct from the District Court were provided in cases where application should be made to enjoin the enforcement of an order of the Interstate Commerce Commission, and from the final judgment or decree of the District Court concerning orders of the Interstate Commerce Commission; also under the Expediting Act, as amended June 25, 1910, 36 Stat. L. 854; also under Judicial Code, Sec. 266, appeal from the District Court may go direct to the Supreme Court in case of application to enjoin the enforcement of a state law.

Under Judicial Code, Secs. 242 and 243, appeals by either party may be taken to the Supreme Court from the Court of Claims.

Hence in many kinds of cases not falling within Judicial Code, Secs. 128, 238, 239 and 240, the Supreme Court is given direct appellate jurisdiction from the District Court to expedite matters of a highly important nature.

REVIEW IN THE CIRCUIT COURT OF APPEALS.

Judicial Code, Sec. 128, taken in connection with Sec. 238 thereof makes provision for the appellate jurisdiction of this court.

Section 128 was taken from Sec. 6 of the Circuit Court of Appeals Act of March 3, 1891, except that appeals and error from the District Court of Hawaii were included, and the Act of January 28, 1915, 38 Stat. L. 803, added the District Court of Porto Rico.

By Sec. 134 in some cases error and appeal may be prosecuted from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit.

As will be noted the jurisdiction of the Circuit Court of Appeals to review cases from the District Court covers such cases as may not be taken directly to the Supreme Court as provided in Sec. 238; this is the manner in which the jurisdiction was distributed in the Act of 1891, and later enactments have preserved it.

In bankruptcy matters jurisdiction to review is conferred upon the Circuit Court of Appeals by the Bankruptcy Act of 1898 and amendments thereto, as noted in Sec. 24, a and b, and Sec. 25a, and declaration thereof is additionally made in Judicial Code, Sec. 130.

Of course, the force of the provisions of the Judicial Code and other statutes for review of the decisions of the Supreme Courts of the continental territories has been spent now that all such territories have assumed state organizations.

The scope and origin of the provisions of Judicial Code, Sec. 128, are set out in *Street v. Atlas Mfg. Co.*, 231 U. S. 348, 58 L. Ed. 262.

Further, this court has appellate jurisdiction from the United States Court for China (Ninth Circuit), Judicial Code, Sec. 131; from the Canal Zone (Fifth Circuit), Act of August 24, 1912, 35 Stat. L. 585, and by Act of March 3, 1917, from the Danish West Indian Islands (the Virgin Islands). In all the above mentioned cases the review is of

a final decision; Sec. 129 of the Judicial Code provides for a review of interlocutory orders concerning injunctions or appointing receivers.

The Clayton Act, October 15, 1914, 38 Stat. L. 734, provides that proceedings for the enforcement of an order made by the Federal Trade Commission, the Federal Reserve Board or the Interstate Commerce Commission, in carrying out the provisions of said act, may be begun by making application to the Circuit Court of Appeals for the appropriate circuit. The Circuit Court of Appeals shall have exclusive jurisdiction of such applications, and its judgment thereon shall be subject to review in the Supreme Court on certiorari, according to Judicial Code, Sec. 240.

REVIEW BY THE COURT OF CUSTOMS APPEALS.

This court was created by the Payne-Aldrich Tariff Bill of 1909, 36 Stat. L. 105, Sec. 28, and quoted Sec. 29 therein, and the act is included in the Judicial Code, Secs. 188 to 199, 36 Stat. L. 1143, March 3, 1911. Sec. 195 of the Judicial Code confers upon this court the exclusive appellate jurisdiction to review by appeal final decisions of the Board of General Appraisers.

Review by the Supreme Court may be had only by certiorari, as provided by Sec. 195.

This Sec. 195 has been amended by the Act of August 22, 1914, 38 Stat. L. 703, this amendment consisting in the addition thereto of the two provisos found therein.

TWO FORMS OF PROCEEDING IN THE SAME CASE.

Each of the forms of proceeding mentioned above (pp. 2749, 2750) is exclusive of all the others, that is to say, when the appellate jurisdiction may be invoked by one of these methods, the appellate court has no jurisdiction when another form of proceeding is used (except where statute otherwise provides, noted below).

It is sometimes hard to determine which form of proceeding to employ. When the moving party is uncertain as to the nature of his remedy he may, out of abundant caution and to guard against a possible chance of dismissal, take the case to the appellate court in two ways. This is frequently done. In such case the appellate court will select the proper proceeding and dismiss the other.

Two forms of appellate proceedings to review one action in the court below constitute but one case in the appellate court. One record is sufficient and it is not necessary to docket the cause twice because it was brought both by appeal and writ of error, or by appeal and petition to review an order of a court of bankruptcy, or by appeal or writ of error and also by writ of certiorari to review a decision of the Circuit Court of Appeals in the Supreme Court.

THE DISTINCTION BETWEEN AN APPEAL AND A WRIT OF ERROR.

An appeal is a process of civil law origin and removes a cause entirely, subjecting the fact as well as the law to a review and retrial. A writ of error is a process of common law origin, and it removes nothing for reexamination but the law.

In the legislation of Congress, from the foundation of the government, a writ of error, which brings up matters of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact.

In the first judiciary act the judgments or decrees of the Circuit Court, whether in law, equity or admiralty, could be reviewed by the Supreme Court only by writ of error. Under that act, it was held that the removal of suits, from the Circuit Court into the Supreme Court must be by writ of error, in every case, whatever may be the original nature of the suits, whether at law, in equity or admiralty and that questions of law only were presented for review.

In 1803 Congress substituted an appeal from the Circuit Court to the Supreme Court, instead of a writ of error, in cases in equity and admiralty. Upon such an appeal the facts as well as the law were open to review in both those classes of cases. In 1875 the appeal in admiralty to the Supreme Court was restricted to questions of law only, but this act does not apply to appeals to the Circuit Court of Appeals. At present an appeal in equity or admiralty brings into the appellate court the facts as well as the law for revision.

Judgments of a District Court in actions at law have always been reviewable in the appellate court by writ of error only. Upon such a writ of error the appellate court can not review the decision of the court below on a question of fact. In such a case Mr. Justice Story said: "We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury; or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision."

In all acts of Congress regulating judicial proceedings the word "appeal," unless restricted by the context, indicates that the facts as well as the law involved in the judgment below may be reviewed in the appellate court. When the words "writ of error" are used in a statute they indicate that questions of law only may be reviewed in the appellate court. In the absence of modification by statute this is the rule in respect to all courts whose records may be brought to a federal appellate court for review.

Speaking of the original judiciary act, Mr. Chief Justice Ellsworth said: "The judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptance, unless something appears in the act itself, to con-

trol, modify, or change the fixed and technical sense which they have previously borne."

It is well settled that, in those states where the distinction between law and equity is not recognized in the state courts, the distinction must be preserved in the federal courts, and equity causes must be reviewed by appeal and common law causes by writ of error.

38 Stat. L. 956, Judicial Code, Sec. 274b, provides that equitable defenses may be made in an action at law by answer, plea or replication without the necessity of filing a bill on the equity side of the court; review of the judgment or decree entered in such case shall be regulated by rule of court, and whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

Statutes have still further removed the distinction, procedurally speaking, between law and equity by providing that no court having power to review a judgment or decree rendered or passed by another, shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out; but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed. 39 Stat. L. 727, Act of Sept. 6, 1916.

JUDGMENTS AT LAW ARE REVIEWABLE ON WRIT OF ERROR ONLY.

A final judgment of a District or Circuit Court in an action at law can only be revised in an appellate court on writ of error.

METHOD OF REVIEWING ORDERS OR DECREES ON INTERVENING PETITIONS.

Where a person incidentally interested in some branch of a cause has been allowed to intervene for the purpose of

protecting his interest and a final decision of his right or claim has been made by the court below, that decision may be reviewed on appeal before the actual termination of the litigation in the main cause.

The right of an intervenor to appeal from a decision of a court of bankruptcy has been sustained where he asserted title to property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy being treated as one of those "controversies arising in bankruptcy proceedings," over which the Circuit Court of Appeals could under Sec. 24a of the Bankrupt Act exercise appellate jurisdiction as in other cases.

The fact that such orders may be reviewed and that the method of obtaining the review is by appeal and not by writ of error has never been seriously contested. The subject of discussion in this class of cases has been the finality of the order or decree appealed from. Intervening claims, though arising incidentally in the cause, have a distinct and independent character. They present independent issues to be determined between the parties to them. When there is a final determination of the particular matter arising upon such a claim there can now be no question of the right of either party to prosecute an appeal to review it.

The theory upon which an appeal and not a writ of error is allowed to review an order or decree upon an intervening petition is that by intervening in an equity cause, a person submits his cause of action to a court of equity. His claim, though legal in its nature, is litigated on the equity side of the court. The judge may determine the issues himself, or he may refer them to a master with instructions to file a report of both the law and the facts, or he may order a jury to be called to try the issues. Whichever method is employed, the character of the proceedings in equity is not changed. This being so, the order or decree is reviewable only on appeal and not by writ of error.

THE METHOD OF REVIEWING CRIMINAL CASES.

A writ of error and not an appeal is the proper method of reviewing a judgment in a criminal case either in a Circuit Court of Appeals or the Supreme Court.

The reason for this is that a criminal case is always prosecuted on the law side of the court and therefore reviewable only by writ of error.

THE METHOD OF REVIEWING CONTEMPT CASES.

The method of reviewing an order of commitment for contempt for violation of an order of court depends upon the nature of the proceeding.

Where the proceeding for contempt is against one not a party to the suit, and the proceeding is entirely independent and its prosecution does not delay the conduct of the action to a final decision the proceeding may be said to be *sui generis*, and the order imposing punishment in effect a final judgment in a criminal case. In that case the proceeding may be removed to the Circuit Court of Appeals on writ of error, and not on appeal, and there reviewed in the exercise of appellate jurisdiction in criminal cases under Sec. 6 of the Judiciary Act of 1891.

Where the proceeding is civil in its nature and the order imposing punishment merely an interlocutory order in the main suit, it is not reviewable until after a final judgment or decree in the case, and then by writ of error or appeal according to the nature of the main suit.

An order of a court of bankruptcy adjudging a party disobeying an order of that court to be in contempt is reviewable on petition for revision as to matters of law.

The judgment of a Circuit Court of Appeals in a contempt case is final, because it is a criminal case, and can be reviewed in the Supreme Court only by writ of certiorari.

THE METHOD OF REVIEWING HABEAS CORPUS PROCEEDINGS.

Final orders of the Circuit or District Courts in habeas corpus proceedings can only be reviewed by appeal and not by writ of error.

THE METHOD OF REVIEWING MANDAMUS CASES.

A writ of error and not an appeal is the proper method of reviewing a judgment in a proceeding for mandamus.

The reason for this is that an application for a writ of mandamus is a proceeding at common law and therefore reviewable only by writ of error. This brings up for review in the appellate court only questions of law.

WHEN A JUDGMENT OR DECREE BECOMES FINAL.

A judgment or decree regularly becomes final for the purpose of a writ of error or appeal on the date of the actual entry, or of the signing and filing of the final judgment or decree.

Whether a judgment or decree becomes final upon the date it is signed by the judge or the date it is recorded by the clerk depends somewhat upon the nature of the decision and upon the usage and practice of the particular court. In the case of a simple judgment or decree, where no settling is required by the judge, it may become final after the decision of the case is pronounced and entered by the clerk. But where the decree is special and its terms to be settled it can hardly be final before its settlement by the judge. Whether an appeal shall then be taken or not may depend upon the decree as settled.

An order to enter a decree in conformity with an opinion is not a final decree. The case is not finally determined to allow of appeal until such decree is actually entered. Thus, where an entry contained all the elements of a final decree and afterwards the court settled and entered a formal final decree, the Supreme Court held the later decree was intended

by the Circuit Court to be its final decree and that it did not become final until that decree was entered. A final judgment or decree entered nunc pro tunc becomes final for the purpose of review as of the date of its actual entry. When a judgment or decree is amended, it becomes final as of the date of the amendment.

THE EFFECT OF A MOTION FOR NEW TRIAL ON FINALITY.

A motion for a new trial or a petition for rehearing, seasonably filed, suspends the finality of the judgment or decree in the case until it is disposed of by the court, or withdrawn by the party filing it.

The reason for this rule is that while a motion is pending the lower court has not lost its jurisdiction over the case, and, having power to grant a new trial or rehearing, the judgment or decree is not final for the purpose of suing out a writ of error or taking an appeal. If the court grants the motion the effect is to vacate the former judgment or decree and leave the parties in the same situation as if no trial had ever taken place in the case. If the court grant a rehearing in equity as to certain questions, the decree does not become final until these matters are determined. If the court denies the motion or petition, the judgment or decree, before entered, becomes final as of the date of the order of court denying the motion or petition.

To have the effect of suspending the finality of a judgment or decree the application for rehearing must be made during the term at which the judgment or decree is entered. After the expiration of the term all final judgments or decrees rendered and entered of record pass beyond the control of the court, unless steps be taken during the term, by motion or otherwise, to set aside, modify or correct them.

A motion for rehearing does not have the effect of suspending the finality of a decree unless filed within the time limited by law within which to prosecute a writ of error or appeal. A motion for rehearing can not be used to extend

the statutory time within which to prosecute a writ of error or an appeal.

After a writ of error or an appeal has been allowed and perfected the case has passed beyond the jurisdiction of the lower court. A motion for rehearing filed during the term in which the judgment or decree is rendered does not affect such judgment or decree, because the court entering it has no power to set it aside or modify it. If the appeal or writ of error has been allowed and remains unperfected when the petition for rehearing is filed, the cause has not passed into the jurisdiction of the appellate court, and the court below may set aside the judgment or decree and also order of allowance.

FINAL DECISIONS OF APPELLATE COURTS.

The power of the Supreme Court to revise the action of other appellate courts is limited to final judgments and decrees of such courts.

The general rule is that a judgment or decree of an appellate court is final when it remands a case to the court below with directions to enter a specific judgment or decree and nothing remains for that court to do, except to enter judgment or decree in accordance with the mandate.

The same rules govern the finality of decisions of all the intermediate appellate courts for purposes of review by the Supreme Court of the United States on appeal or writ of error.

In a case removed from a federal appellate court to the Supreme Court, the question of the finality of a judgment or decree of either of the inferior courts will be determined by the Supreme Court. If the Supreme Court of a state has a judgment of an inferior court of the state to be final, the Supreme Court of the United States will treat it as a final decree in exercising appellate jurisdiction in the same case.

The fact that the mandate of the appellate court has gone down and the court below entered its decree or judgment

conformity with it before the appeal or writ of error is prosecuted to the Supreme Court does not affect the appellate jurisdiction of that court to review the decision of the intermediate appellate court.

A judgment or decree of an appellate court affirming a final decision of the court below is final and reviewable.

A decision of an appellate court reversing a judgment or decree of an inferior court is final, when it directs a dismissal of the action, or remands the case with directions to enter a specific judgment or decree without leaving the court below any judicial discretion in the matter.

The decision of an appellate court reversing the decree or judgment of an inferior court is not final when it remands the case to the court below for further proceedings in accordance, or not inconsistent, with the views of the appellate court as expressed in a written opinion, or otherwise leaves something for the court below to do in the exercise of its judicial discretion.

DECISIONS IN REMOVAL CASES.

An order remanding a case to the state court from which it was removed into that court is not final and no writ of error or appeal will now lie to review it. The reason that it is not final is that it is not decisive of the cause, but rather a refusal to hear and decide it.

If the District Court remands a cause and the state court thereupon proceeds to final judgment, the action of the District Court is not reviewable in the Supreme Court on writ of error to the judgment of the state court in that case. In other words, the order of the District Court remanding the cause to the state court is conclusive and not reviewable in any court.

A decree dismissing a bill in equity terminates the litigation in that suit. It is a final decree and reviewable on appeal taken by the plaintiff.

the statutory time within which to prosecute a writ of error or an appeal.

After a writ of error or an appeal has been allowed and perfected the case has passed beyond the jurisdiction of the lower court. A motion for rehearing filed during the term at which the judgment or decree is rendered does not affect such judgment or decree, because the court entering it has no power to set it aside or modify it. If the appeal or writ of error has been allowed and remains unperfected when the petition for rehearing is filed, the cause has not passed into the jurisdiction of the appellate court, and the court below may set aside the judgment or decree and also the order of allowance.

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The same rules govern the finality of decisions of all of the intermediate appellate courts for purposes of review in the Supreme Court of the United States on appeal or writ of error.

In a case removed from a federal appellate court to the Supreme Court, the question of the finality of a judgment or decree of either of the inferior courts will be determined by the Supreme Court. If the Supreme Court of a state holds a judgment of an inferior court of the state to be final, the Supreme Court of the United States will treat it as a final decree in exercising appellate jurisdiction in the same case.

The fact that the mandate of the appellate court has gone down and the court below entered its decree or judgment in

conformity with it before the appeal or writ of error is prosecuted to the Supreme Court does not affect the appellate jurisdiction of that court to review the decision of the intermediate appellate court.

A judgment or decree of an appellate court affirming a final decision of the court below is final and reviewable.

A decision of an appellate court reversing a judgment or decree of an inferior court is final, when it directs a dismissal of the action, or remands the case with directions to enter a specific judgment or decree without leaving the court below any judicial discretion in the matter.

The decision of an appellate court reversing the decree or judgment of an inferior court is not final when it remands the case to the court below for further proceedings in accordance, or not inconsistent, with the views of the appellate court as expressed in a written opinion, or otherwise leaves something for the court below to do in the exercise of its judicial discretion.

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A decree dismissing a bill in equity terminates the litigation in that suit. It is a final decree and reviewable on appeal taken by the plaintiff.

Recent Decisions on "Final Judgments or Decrees." Final "decision" in Judicial Code, Sec. 128, means the same thing as final "judgments and decrees" in earlier acts. *Ex parte Tiffany*, Recr., 252 U. S. 32, 64 L. ed. —.

That the right to review extends only to final judgments or decrees is well settled. *Mo. R. Co. v. Olathe*, 222 U. S. 185, 56 L. ed. 155; *La. Nav. Co. v. La. Com'n*, 226 U. S. 99, 57 L. ed. 138; *Rio Grande W. Co. v. Stringham*, 239 U. S. 44, 60 L. ed. 136; *Morgan v. Thompson*, 124 Fed. 203, 59 C. C. A. 672.

No judgment is final which does not terminate the litigation on the merits of the issue involved, and then only when it is entered in a court having power of execution. *Crooker v. Knudsen*, 232 Fed. 857, 147 C. C. A. 51.

Or the party against whom a substantial right has been determined has no adequate relief except by appeal. *Odell v. Batterman Co.*, 223 Fed. 292, 138 C. C. A. 534.

Judgment in suit for writ of prohibition is final if the suit is disposed of. *Detroit, etc., R. Co. v. Michigan Ry. Com'n*, 240 U. S. 564, 60 L. ed. 802.

Likewise in a mandamus proceeding. *Amer. Exp. Co. v. Michigan*, 177 U. S. 404, 44 L. ed. 823.

Where a reference is made for an accounting, for some illustrations of decisions not final see *LaBourgogne*, 210 U. S. 95, 52 L. ed. 973 (admiralty proceeding to limit liability); *Ex parte Enameling Co.*, 201 U. S. 156, 50 L. ed. 707.

Where federal jurisdiction is invoked solely on the ground of diversity of citizenship, the decision of the Circuit Court of Appeals is final, though another ground of jurisdiction appears during the proceedings. *McCormick v. Oklahoma City*, 236 U. S. 657, 59 L. ed. 771; *Roman Catholic Church v. Penn. Ry. Co.*, 237 U. S. 575, 59 L. ed. 1119; *Norton v. Whiteside*, 239 U. S. 144, 60 L. ed. 186.

But where jurisdiction is based on diversity of citizenship and on other grounds not specified in Sec. 128, the decision is not final under that section. *Christianson v. King Co.*, 239 U. S. 356, 60 L. ed. 327; *Vicksburg v. Henson*, 231 U. S. 259, 58 L. ed. 209; *Louis. R. Co. v. Brewing Co.*, 223 U. S. 70, 56 L. ed. 355; *Hull v. Burr*, 234 U. S. 713, 58 L. ed. 1559; *Delaware, etc., R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397; *Lovell v. Newman*, 227 U. S. 412, 57 L. ed. 577.

But if the federal question is unsubstantial and has no merit, either because it is frivolous or has been clearly adjudicated by the Supreme Court, there is no appeal to the Supreme Court. *Merriam Co. v. Syndicate Publishing Co.*, 237 U. S. 618, 59 L. ed. 1148.

A judgment in a case involving the Federal Employers' Liability Act is not final under Sec. 128. *Mo. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355.

**WRIT OF ERROR FROM A CIRCUIT COURT OF
APPEALS TO A DISTRICT COURT.**

No. 1789.

**Petition for Writ of Error Returnable to a Circuit Court of
Appeals.(1)**

The District Court of the United States, for the — District of —.

| | | |
|--|---|--|
| A. B., Plaintiff, <i>vs.</i> C. D., Defendant. | } | At Law. Petition for Writ of Error. |
|--|---|--|

And now comes A. B., plaintiff [*or*, defendant], herein, and says that on or about the — day of —, this court entered judgment herein in favor of the defendant [*or*, plaintiff] and against this plaintiff [*or*, defendant] in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff [*or*, defendant], all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff [*or*, defendant] prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the — circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

R. X.,
Attorney for Plaintiff.

(1) This petition should be entitled and filed in the court at which the trial was had, and the assignment of errors should be filed with this petition. See 11th Rule Circuit Court of Appeals; also 24th Rule, par. 4, and R. S. U. S., Sec. 997.

A formal petition is not absolutely necessary. *Alaska, etc., Min. Co. v. Keating*, 116 Fed. 561; *Trust Co. v. Stockton*, 18 C. C. A. 408, 72 Fed. 1.

It is well settled that cases at law can be brought to the Supreme Court, and therefore to a Circuit Court of Appeals, only by writ of error. *Sarchet v. United States*, 12 Peters, 143; *Bevins v. Ramsey*, 11 How. 185; *Burrows v. Carrow*, 15 Wall. 682; *Stringfellow v. Cain*, 99 U. S. 610; *U. S. v. Union Pac. R. R. Co.*, 105 U. S. 263; *Hecht v. Boughton*, 105 U. S. 235; *Woolf v. Hamilton*, 108 U. S. 15; *U. S. v. Hailey*, 118 U. S. 233; *Muhlenberg County v. Dyer*, 65 Fed. 634, 13 C. C. A. 664.

The time limited for a writ of error returnable to a Circuit Court of Appeals is six months after a final judgment is entered in the District Court. Act of March 3, 1891, Sec. 11, 26 Stat. at L. 826. The time does not begin to run until a motion for new trial is disposed of. *Kingman vs. Western Mfg. Co.*, 170 U. S. 675.

As to amending petition see *Gorham v. Broad River Tp.*, 113 Fed. 83; *In re Wight*, 134 U. S. 136; *Alaska Unitel Gold Min. Co. v. Keating*, 116 Fed. 561.

Jurisdiction does not depend upon the amount in dispute in cases taken by writ of error or appeal from the District Courts to the Circuit Courts of Appeals under the Act of March 3, 1891. *The Paquete Habana*, 175 U. S. 683.

The question has frequently arisen as to whether a case should be removed on writ of error or appeal to a Circuit Court of Appeals or to the Supreme Court of the United States from a District Court, and the matter has been considered both by the Supreme Court and the Circuit Courts of Appeals in the following cases: *Carter v. Roberts*, 177 U. S. 496; *Holt v. Indiana Mfg. Co.*, 46 U. S. App. 717, 176 U. S. 68; *U. S. v. Jahn*, 155 U. S. 109; *New Orleans v. Benjamin*, 153 U. S. 411; *Benjamin v. New Orleans*, 169 U. S. 161; *City of Owensboro v. Owensboro Waterworks*, 115 Fed. 318; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1; *Dawson v. Trust Co.*, 102 Fed. 200. See also No. 1788 ante.

R. S. U. S., Sec. 997, requires that there be annexed to a writ of error (1) authenticated transcript of the record, (2) an assignment of errors, (3) a prayer for reversal, (4) a citation to the adverse party.

Who May Apply for Review. General rule is that no person may have a judgment reviewed by appeal or error unless he is a party or privy to the record. *Louisiana v. Jack*, 244 U. S. 397, 61 L. ed. 1222.

And this is not changed by a state statutory provision authorizing any one aggrieved by a judgment to appeal therefrom. Same case.

Suing Out a Writ of Error. See *Camden Iron Works Co. v. City of Cincinnati*, 241 Fed. 846 (6 C. C. A.), where Sec. 11 of the Act of March 3, 1891, as to suing out a writ of error is construed and applied with technical strictness.

A writ of error is "sued out" under the provisions of Sec. 11 of the Act of March 3, 1891, 26 Stat. L. 829, when it is properly obtained and issued; merely filing the petition and bond and the allowance by the court is not sufficient. *Waxahachie v. Coler*, 92 Fed. 284, 34 C. C. A. 394.

Bringing a Writ of Error. A writ of error is not "brought" under R. S. U. S., Sec. 1008, until the writ is actually filed or lodged with the clerk of the court rendering the judgment in question. *Nick Williams Co. v. U. S.*, 215 U. S. 541, 54 L. ed. 318; *Kentucky Coal Co. v. Howes*, 153 Fed. 163, 82 C. C. A. 337.

Time for Filing Transcript. The transcript must be filed during the next term after the term in which the writ of error was sued out or appeal allowed. *Freeman v. U. S.*, 227 Fed. 732, 142 C. C. A. 256.

But a court rendering a judgment or decree sought to be reviewed may enter an order extending the term. *Freeman v. U. S.*, 227 Fed. 732, 142 C. C. A. 256.

What Is the Record? Only the process, pleadings, orders, judgment of the court, and such matters as are properly preserved in the bill of exceptions, can be deemed as constituting the record, unless made so by agreement of parties or order of the court. *Eldorado Coal Co. v. Mariotti*, 215 Fed. 51, 54, 131 C. C. A. 359.

Damages and Costs on Affirmance. Where there is affirmance on error, damages and costs of respondents shall be adjudged. R. S. U. S., Sec. 1010.

Reversal. Reversal on error is limited by R. S. U. S., Sec. 1011; this section is not applicable to case coming from a state court to the Supreme Court. *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. ed. 189.

The section prohibits reversal for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error of fact.

Scope of Review. Decisions upon the admission and exclusion of evidence, questions of law, the question whether or not there is any substantial evidence to warrant the finding, and whether or not the finding supports the judgment, are the only rulings at the trial that may be reviewed. *Barnsdale v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515.

In order to test on review the question of the sufficiency of the evidence to sustain the verdict, a peremptory instruction to charge in his behalf should be asked at the close of the evidence. *Joplin R. R.*

Co. v. Payne, 194 Fed. 387, 114 C. C. A. 305; Michigan Home Colony Co. v. Tabor, 141 Fed. 332, 72 C. C. A. 480; Mead v. Darling, 159 Fed. 684, 86 C. C. A. 552; Rainy Lake Corp. v. Rainy R. Co., 162 Fed. 287, 89 C. C. A. 267.

Whether damages were excessive is not a question for the reviewing court on error. Chicago R. Co. v. Ponn, 191 Fed. 682, 112 C. C. A. 228; Joplin R. Co. v. Payne, 194 Fed. 387, 114 C. C. A. 305.

Where issues of fact are left to the trial judge, his findings are not subject to review on error. U. S. v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310.

Remand. Provision for remand of cases by Supreme Court and Circuit Court of Appeals is made by Sec. 10 of the Act of March 3, 1891, 26 Stat. L. 829; this has remained, although the remainder of the statute has in great part been somewhat changed by re-enactment in the Judicial Code.

No. 1790.

Petition for Writ of Error.

[Caption.]

The petition of Genevieve B. Knisely, wife of Benjamin A. Knisely, both citizens of the State of Illinois, with respect represents:

I. That on the 8th day of May, 1916, petitioner instituted her suit in the District Court of the United States for the Eastern District of Louisiana, having been duly authorized to prosecute the same, against Angelo R. Burt, a citizen of the State of Louisiana.

II. That the petition in said action at law alleged that the plaintiff was the owner of an automobile, valued at the sum of \$2,250; that said car was located in her garage in Scott Street, in the City of New Orleans, which garage was securely locked, and the key thereof in her possession.

III. That on the 3rd day of May, 1916, defendant, without permission or authority, broke into and entered the garage of petitioner, at midnight, and clandestinely seized and removed said car, and that defendant took possession thereof, and has remained in possession since that time.

IV. That petitioner has suffered damages in the sum of \$1,000;

(a) In that she has been compelled to employ counsel to institute this suit, in order to recover the car violently taken from her possession, and has obligated herself to pay said counsel the sum of \$500.

(b) That for the tortious acts of the defendant, and for the deprivation of the pleasure and comfort derived by her from the use of said car, petitioner sustained damages in the further sum of \$500.00; that petitioner reserved her right by supplemental petition, to recover additional damages for the further deprivation of the use and enjoyment of her said car, through the acts of said defendant.

V. That petitioner also prayed for a writ of sequestration upon the ground that she feared that defendant might send said car out of the jurisdiction of the court, during the pendency of said suit, and also for a decree, declaring your petitioner to be the owner of said car, and for judgment condemning said Angelo R. Burt to pay to her the sum of \$1,000, with interest thereon from date of judgment until paid, for all costs, etc.

VI. That on the 10th day of May, 1916, the United States marshal took possession of said car, under said writ, and said defendant obtained the custody of the car on bond; that thereafter, petitioner filed an amended and supplemental petition, praying for damages at the rate of \$25.00 per day for the deprivation of the use and the pleasure of said car.

VII. That on the 20th day of May, 1916, said defendant moved to dismiss petitioner's suit, for want of jurisdiction *ratione materiae*; and that on the 7th day of June, 1916, the said District Court dismissed the suit of your petitioner on the ground that the District Court was without jurisdiction, and held that the amount in controversy did not exceed the sum of \$3,000, exclusive of interest and costs.

VIII. That petitioner conceiving herself aggrieved by the judgment entered on the 7th day of June, 1916, and signed on the 13th day of June, 1916, in the above entitled proceedings, desires to have said judgment reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, on writ of error.

IX. *Wherefore*, the annexed assignment of errors considered, your petitioner prays that a writ of error may issue, and that petitioner may be allowed to bring up for review before the United States Circuit Court of Appeals for the Fifth Circuit, the said judgment and decree of the said District Court, dismissing the suit of petitioner; and that after due hearing there be judgment reversing the decree of the said District Court, and that petitioner may have such other and further relief in the premises as may be just.

X. Y.,

(Verification.)

Attorney for Petitioner.

No. 1791.

Order Staying Proceedings Pending Error Proceedings.

[*Caption.*]

The defendant, The Atchison, Topeka and Santa Fe Railway Company, having on the 17th day of July, 1914, filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed, now, therefore,

It Is Ordered that upon said defendant filing with the clerk of this court a good and sufficient bond in the sum of five hundred dollars (\$500.00), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by this court, that all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

OLIN WELLBORN,
District Judge.

No. 1792.

Order for Writ of Error, Supersedeas and Bail in Criminal Case.(1)

[*Caption.*]

On this 7th day of July, 1916, came Fred Marhoefer and Thomas Walsh and presented to the undersigned judge of the District Court their petitions for the allowance of a writ of error to said District Court for the United States Circuit Court of Appeals for the Seventh Judicial Circuit for the correction of errors complained of in said petitions, together with assignments of errors intended to be urged by them in the support of said writs of error, said petitions and assignments of error having theretofore been filed in the above entitled cause in the office of the clerk of the said District Court in compliance with the rules of said United States Circuit Court of Appeals.

In consideration it is hereby ordered by the undersigned judge of the District Court, in pursuance of the prayer of said petitions for writs of error, that said writs of error be allowed as prayed for in said petitions, and that said writs of error each act as supersedeas staying the execution of the

judgment and sentence pronounced in said District Court upon the said Fred Marhoefer and the said Thomas Walsh during the pendency of said writs of error, and that upon service of said writs of error the said Fred Marhoefer be admitted to bail upon his entering into a good and sufficient bond in the sum of ten thousand dollars, conditioned as required by law, with surety to be approved by the clerk of the District Court and that the said Thomas Walsh be admitted to bail upon his entering into a good and sufficient bond in the sum of five thousand dollars, conditioned as required by law, with surety to be approved by the clerk of the District Court.

In further consideration whereof it is also hereby ordered by the said undersigned judge of the District Court that the clerk of said District Court make return of said two writs of error allowed to the said Fred Marhoefer and Thomas Walsh by transmitting to said United States Circuit Court of Appeals a single true copy of the record and bill of exceptions and proceedings and all things concerning the same in the above entitled cause, No. 5612, in said District Court, and also assignments of error filed on behalf of said Fred Marhoefer and on behalf of said Thomas Walsh, and the petitions for writs of error filed in the above entitled cause by the said Fred Marhoefer and the said Thomas Walsh.

Done this 7th day of July, A. D. 1916, in the city of Chicago, Illinois, in the district aforesaid.

K. M. L.,

Judge of the District Court of the United States for
the Northern District of Illinois, Eastern Division.

(1) Supersedeas is dealt with by R. S. U. S., Sec. 1007; the writ of error may be a supersedeas without order to that effect, if proceedings required by the statute have been had. *Butchers' Assn. v. Slaughter House Co.*, 4 Fed. Cas. No. 2234.

The writ of error does not operate as a supersedeas unless filed in the clerk's office in the statutory time. *Robinson v. Furber*, 189 Fed. 918; *Foster v. Kansas*, 112 U. S. 201, 28 L. Ed. 629.

No. 1793.**Order Allowing Writ of Error Where the United States is the Party Defendant, Hence Bond not Required.**

[Caption.]

On this 15th day of March, 1915, the above named defendants appearing by E. A. Johnson, their attorney, and filing herein and presenting to the court their petition praying for the allowance of a writ of error and assignment of errors intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

Now, on consideration thereof, the court does allow the writ of error as prayed in the petition of defendants, without bond of defendants, it appearing that the above entitled cause is one in which the United States, and not the record defendants, is the real party in interest in said cause, and this appeal being taken by direction of the Department of Justice of the United States of America.

R. S. BEAN,

Judge of the District Court.

No. 1794.**Order Allowing Writ of Error.(1)**

The District Court of the United States, for the — District of —.

| | |
|-------------------|------------------|
| A. B., Plaintiff, | } At Law. No. —. |
| vs. | |
| C. D., Defendant. | |

This — day of —, came the plaintiff [*or*, defendant] by his attorney, and filed herein and presented to the court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the — judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff [*or*, defendant] giving bond according to law, in the sum of — dollars, which shall operate as a supersedeas bond.

(1) A writ of error is usually allowed by a judge. It is enough, however, that it is issued and served by a copy lodged with the clerk of the court to which it is directed. *Davidson vs. Lanier*, 4 Wall. 447, 18 L. Ed. 337; *ex parte Virginia Com'rs*, 112 U. S. 177, 5 Sup. Ct. 421, 28 L. Ed. 691; *Trust Co. vs. Stockton*, 18 C. C. A. 408, 72 Fed. 1; *Alaska United Gold Min. Co. vs. Keating*, 116 Fed. Rep. 561.

No. 1795.**Writ of Error from a Circuit Court of Appeals to a District Court.(1)**

The United States Circuit Court of Appeals,
for the — Circuit.

The United States of America,
— Judicial Circuit, ss.

The President of the United States,

To the Honorable Judge of the District Court of the United States for the — District of —, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between A. B., plaintiff, and C. D., defendant, a manifest error hath happened, to the great damage of the said A. B., plaintiff, [*or*, C. D., defendant], as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the — circuit, together with this writ, so that you have the same at —, in said circuit, on the (2) — day of — next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this — day of —, A. D. —, and in the — year of the independence of the United States of America.

Allowed by H. F.,

U. S. District Judge. (3)

Attest:

B. R., (4)

Clerk of the District Court of the United States, — District of —.

[*Seal.*]

(1) It is well settled that cases at law can be brought to the Supreme Court, and therefore to a Circuit Court of Appeals only by writ of error. *Sarchet vs. United States*, 12 Peters, 143; *Bevins vs. Ramsey*, 11 How. 185; *Burrows vs. Carrow*, 15 Wall. 682; *Stringfellow vs. Cain*, 99 U. S. 610; *U. S. vs. Union Pac. R. R. Co.* 105 U. S. 263; *Hecht vs. Boughton*, 105 U. S. 235; *Woolf vs. Hamilton*, 108 U. S. 15; *U. S. vs. Hailey*, 118 U. S. 233; *Muhlenberg County vs. Dyer*, 65 Fed. Rep. 634, 13 C. C. A. 664.

A writ of error is sued out within the meaning of the statute when it is filed in the clerk's office. "It is the filing of the writ that removes the record from the inferior to the Appellate Court," is the declaration of the Su-

preme Court as early as the year 1850, and which has been repeated in numerous cases. *Brooks v. Norris*, 11 How. 204-207; *Mussina v. Cavazos*, 6 Wall. 355; *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. 877; *Polleys v. Improvement Co.*, 113 U. S. 81, 5 Sup. Ct. 369; *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 260, 9 Sup. Ct. 107. See also, *Warner v. Railroad Co.*, 4 C. C. A. 670, 54 Fed. 920; *Stevens v. Clark*, 10 C. C. A. 379, 62 Fed. 321.

Where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record of the District Court, before a writ of error or an appeal by less than the whole can be allowed. *Masterson v. Herndon*, 10 Wall. 416; *Simpson v. Greeley*, 20 Wall. 152; *Estis v. Trabue*, 128 U. S. 225; *Hardee v. Wilson*, 146 U. S. 179; *Davis v. Mercantile Trust Co.*, 152 U. S. 590; *Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123; and see *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 7 C. C. A. 3. But where a judgment in a District Court is rendered against several persons it is not necessary for all of them to join in prosecuting a writ of error where the judgment is final and separate or separable. *Hanrick v. Patrick*, 119 U. S. 156, 164; *Germain v. Mason*, 12 Wall. 259; *Cox v. U. S.*, 6 Pet. 172.

(2) Not exceeding thirty days from signing the citation. Rule 14 C. C. A.

As to the effect of a writ being returned after the day it is made returnable, see *Bingham v. Morris*, 7 Cranch, 99; *Altenberg v. Grant*, 83 Fed. 981, 28 C. C. A. 244; the rule is discretionary, *Love v. Busch*, 142 Fed. 429, 73 C. C. A. 545.

(3) A writ of error is usually endorsed allowed by a judge of the trial or Appellate Court. *Warner v. Ry. Co.*, 54 Fed. 920, 4 C. C. A. 670. It is not absolutely necessary, however, that a writ of error should be allowed by a judge. *Alaska United Gold Mining Co. v. Keating*, 116 Fed. 561; *Trust Co. v. Stockton*, 18 C. C. A. 408, 72 Fed. 1.

(4) Writs of error returnable to Circuit Court of Appeals are issued by the clerks of District Courts under authority of Rev. Stat., Sec. 1004. As amended by Act of January 22, 1912, 37 Stat. L. 54, such writ of error may be issued by the clerk of the District Court or of the Circuit Court of Appeals, and where the review is sought in the Supreme Court the writ may be issued by the clerk of the District Court or of the Supreme Court. The writ issued by the clerk of the District Court shall conform as nearly as may be to that issued by the clerk of the Appellate Court in question. *Cotter v. Alabama, etc.*, R. Co., 61 Fed. 748, 10 C. C. A. 35.

As to amending a writ of error, see R. S., Sec. 1005; *Cotter v. Alabama, etc.*, R. Co., 61 Fed. 747, 10 C. C. A. 35; *Estis v. Trabue*, 128 U. S. 225; *Evans v. Brown*, 109 U. S. 180; *Walton v. Chair Co.*, 157 U. S. 342; *Texas P. Ry. v. Kirk*, 111 U. S. 486.

No. 1796.

Summons and Severance.(1)

The District Court of the United States

For the ——— District of ———.

A. B., Plaintiff,

vs.

C. D., E. F. & G. H., Defendants.

To E. F. and G. H.:

You are hereby invited to join with me on or before the ——— day of ——— to prosecute a writ of error in the above entitled cause, returnable to the United States Circuit Court of Appeals for the ——— Circuit, to reverse the judgment in the above entitled cause rendered against us jointly on the ——— day of ———, or you will be deemed to have acquiesced in the said judgment and I shall prosecute said writ of error without joining you as a party.

C. D.

Service of the above is accepted this ——— day of ———, A. D.

E. F.

G. H.

(1) This notice should be served upon all the parties to the joint judgment and filed in the court below and transmitted to the Appellate Court as a part of the transcript of the record.

Where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record of the District Court, before a writ of error or an appeal by less than the whole can be allowed. The reasons for this, as has often been stated, are that the prevailing party to the judgment should have the right to execute it against those who do not appeal, and that neither the Appellate Court nor the party obtaining the judgment ought to be

burdened with successive appeals upon the same matter. And while considerable liberality has been shown in regard to the method by which the severance is effected, the rule itself has been constantly applied. *Masterson v. Herndon*, 10 Wall. 416; *Simpson v. Greeley*, 20 Wall. 152; *Estis v. Trabue*, 128 U. S. 225; *Hardee v. Wilson*, 146 U. S. 179; *Davis v. Mercantile Trust Co.*, 152 U. S. 590; *Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123; *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 7 C. C. A. 3; *Ayres v. Polsdorfer*, 44 C. C. A. 24, 105 Fed. 737.

Where a judgment in a District Court is rendered against several persons it is not necessary for all of them to join in prosecuting a writ of error where the judgment is final and separate or separable. *Hanrick v. Patrick*, 119 U. S. 156, 164; *Germain v. Mason*, 12 Wall. 259; *Cox v. U. S.*, 6 Pet. 172.

No. 1797.

Bond on Writ of Error Returnable to a Circuit Court of Appeals (r).

[Caption.]

Know all men by these presents, that we, A. B. as principal, and J. S. and L. B., as sureties, are held and firmly bound unto the defendant (1) in error (2) C. D., in the full and just sum of — dollars (3) to be paid to the said defendant, C. D., his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord one thousand eight hundred and —.

Whereas, lately at a District Court of the United States for the — district of —, in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a judgment was rendered against the said A. B., and the said A. B. having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. D. citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the sixth circuit, to be

holden at the city of —, in said circuit, on the — day of — next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

S. S.

A. B. [*Seal.*]

T. T.

J. S. [*Seal.*]

Approved by

L. B. [*Seal.*]

H. F.,

District Judge.

(1) A bond on writ of error or appeal is ordinarily essential to the prosecution of the suit in the Appellate Court although it is not essential to the taking of an appeal or the suing out of a writ of error. The bond may be given after the statutory period of limitations fixed for the bringing of appeals or writs of error. *Evans vs. The State Bank*, 134 U. S. 330; *Dodge vs. Knowles*, 114 U. S. 430-438; *Peugh vs. Davis*, 110 U. S. 227; *The Dos Hermanos*, 10 Wheat. 306-311; *Noonan vs. Chester Park Athletic Club Co.*, 93 Fed. Rep. 576, 35 C. C. A. 457.

Trustees in bankruptcy are not required to give bond. Bankruptcy Act of 1898, sec. 25, 30 Stat. at L. 544.

In a criminal case no bond is necessary. *In re Classen*, 140 U. S. 200, 208. The United States does not give bond.

(2) The bond should be made payable to the defendant in error or appellee, *Bigler vs. Waller*, 12 Wall. 142, and should not be made payable to any other person, *Davenport vs. Fletcher*, 16 How. 142. All the appellants need not join in making the bond, *Brockett vs. Brockett*, 2 How. 238.

(3) The amount of the bond is fixed by the Judge allowing the appeal or writ of error, R. S. sec. 1000, and his decision is final unless he violates a statute or rule of practice, *Jerome vs. McCarter*, 21 Wall. 17. The Appellate Court may change the amount in a proper case, *Jerome vs. McCarter*, 21 Wall. 17; *Williams vs. Claflin*, 103 U. S. 753; *Johnson vs. Waters*, 108 U. S. 4.

A judge cannot delegate the approval of a bond to a clerk; *O'Reilly vs. Edrington*, 96 U. S. 724, or a commissioner, *Haskins vs. R. R. Co.*, 109 U. S. 106. It is not necessary to approve the bond in open court; *Hudgins vs. Kemp*, 18 How. 530. The approval of the bond need not be in writing; *Davidson vs. Lanier*, 4 Wall. 447.

Bond as Supersedeas. Rule 13 C. C. A. An appeal or writ of error does not necessarily operate as a supersedeas to stay proceedings. A supersedeas is a statutory right, R. S. Sec. 1007. It does not follow as a matter of law but from compliance by appellant or plaintiff in error with the provisions of this statute. *Goddard v. Ordway*, 94 U. S. 672; *Gay v. Parpart*, 101 U. S. 391; *McCourt v. Singers-Bigger*, 150 Fed. 1102, 80 C. C. A. 56. Without such compliance no court can confer it. *French vs. Shoemaker*, 12 Wall. 100; *Kitchen vs. Randolph*, 93 U. S. 86; *Sage vs. R. R. Co.*, 93 U. S. 416.

The statute refers to error cases only. It has been held that an appeal to operate as a supersedeas must be effected and security given in accordance with the provisions of R. S. sec. 1007; *Adams vs. Law*, 16 How. 148; *Hudgins vs. Kemp*, 18 How. 535; *Kitchen vs. Randolph*, 93 U. S. 86.

Time does not begin to run under this statute while there is a petition for rehearing or a motion to set aside the judgment pending. *Texas & P. Ry. Co. vs. Murphy*, 111 U. S. 488; *Brockett vs. Brockett*, 2 How. 238; *Memphis vs. Brown*, 94 U. S. 715. In computing time Sundays are excluded. *Danville vs. Brown*, 128 U. S. 503.

In all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal. Rule 13 C. C. A.

As to the effect of a supersedeas bond, see *Kountze v. Omaha Hotel Co.*, 107 U. S. 378.

No. 1798.

Order Permitting Cash Deposit in Lieu of Bond.

The District Court of the United States,
for the ——— District of ———.

A. B., Plaintiff,

vs.

C. D., Defendant.

The plaintiff herein having sued out a writ of error herein to remove this cause to the Circuit Court of Appeals for the ——— circuit to reverse the judgment entered herein on the ——— day of ———, A. D. ———; it is hereby ordered that he may deposit ——— (\$——) dollars in lawful money of the United States, with the clerk of this court, in lieu of bond as security for costs on said writ of error.

No. 1799.

Order Fixing Amount of Bail Bond.

The District Court of the United States,
 ——— District of ———.

| | | |
|---------------|---|----------|
| United States | } | No. ———. |
| vs. | | |
| S. R. | | |

It appearing that writ of error has been sued out in this case by the defendant, returnable to the United States Circuit Court of Appeals for the ——— circuit from the judgment made and entered by the District Court on the ——— day of ———.

And it appearing that the United States attorney has no objection,

Ordered, that defendant be admitted to bail pending said writ of error in the sum of ——— dollars, conditions as the law directs.

United States District Judge.

I have no objection to the above and foregoing order.

J. H.,

United States Attorney.

No. 1800.

Order Admitting Plaintiff to Bail (1).

United States Circuit Court of Appeals
 for the ——— Circuit.

J. M.

vs.

The United States of America.

This cause came on to be heard upon an application for bail pending writ of error from the District Court of the United States for the ——— District of ———.

On consideration whereof the application of the petition is hereby allowed on condition that he enter into a bond to be approved by the court below in the same amount of the bond upon which he is now at large, conditioned to make his appearance in the District Court of the United States for the — District of — at —, on the — day of —, 19—, and from day to day thereafter until discharged from his obligation by a new bond or other order of that court.

It is further ordered that a certified copy of this order and of the opinion of the court be made by the clerk of this court and forwarded to the clerk of the District Court for the — District of — forthwith.

(1) The defendant may be admitted to bail pending writ of error either in trial court or in the Appellate Court. *McKnight vs. U. S.* 113 Fed. 451. Supreme Court Rule 36; C. C. A. Rule 35.

No. 1801.

Bail Bond Pending Writ of Error. (1).

The United States of America.

— District of —, ss.

We, C. D., E. F. and G. H., jointly and severally, acknowledge ourselves indebted to the United States of America in the sum of \$—, lawful money of the United States of America, to be levied on our, and each of our goods, chattels, lands and tenements, upon this condition;

Whereas the said C. D. has sued out a writ of error from the judgment of the District Court of the United States for the — District of — in the case in said court wherein the United States of America are plaintiffs and said C. D. is defendant, for a review of said judgment in the United States Circuit Court of Appeals for the — Circuit.

Now, if the said C. D. shall appear and surrender himself in the District Court of the United States for the — District of — on and after the filing in the said District Court of

the mandate of the said Circuit Court of Appeals, and from time to time thereafter as he may be required to answer any further proceedings, and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the — Circuit and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals, this — day of —, A. D.

—.

C. D.,

E. F.,

G. H.

Taken and approved, this — day of —, 19—, before
me.

G. R.,

District Judge.

(1) A writ of error filed within sixty days from the judgment complained of operates as a supersedeas or stay of proceedings without giving any security. R. S. sec. 1007; *Claasen's Case*, 140 U. S. 200; *Hudson vs. Parker*, 156 U. S. 277, 283; Supr. Ct. 36; C. C. A. R. 38; *McKnight vs. U. S.* 113 Fed. Rep. 451, 51 C. C. A. 285.

The trial or the Appellate Court has power to admit a person to bail after conviction pending a writ of error in that class of cases bailable before conviction. *McKnight vs. U. S.*, 113 Fed. Rep. 451, 51 C. C. A. 285.

No. 1802.

Order Reducing Bail in Appellate Court.

United States Circuit Court of Appeals

for the — Circuit.

J. M.

vs.

The United States.

This cause came on to be heard upon the application of the plaintiff in error to reduce the amount of the bail bond fixed

by the trial judge at twenty thousand (\$——) dollars, and was argued by R. Y., Esq., in behalf of the plaintiff in error, the United States attorney not resisting; and it was made to appear to the court that the plaintiff in error is in custody and not able to furnish bail in that amount;

On consideration whereof it is now here ordered that the plaintiff in error be admitted to bail, upon giving bond in the sum of —— (\$——) dollars, with the same sureties who have heretofore been accepted on similar bonds in this prosecution, said bond conditioned that he appear in the District Court of the United States for the —— District of ——, at ——, on the first day of ——, A. D. ——, and from day to day thereafter or until the further order of this court or the District Court. This bond is to be acknowledged before and filed with the clerk of the District Court of the United States for the —— District of ——, whereupon the plaintiff in error shall be discharged forthwith.

No. 1803.

Citation to Defendant in Error (1).

The United States Circuit Court of Appeals,
for the —— Circuit.

The United States of America,
—— Judicial Circuit, ss.

To C. D., Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the —— circuit, to be holden at the city of ——, in said circuit, on the —— day of —— next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the —— district of ——, wherein A. B. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. F., District Judge of the United States, at — within said circuit this — day of —, in the year of our Lord one thousand eight hundred and —, and of the independence of the United States of America the one hundred and —.

H. F.,

United States District Judge.

(1) A citation is essential, R. S., Sec. 999. Notice of a writ of error given in open court at the same term the judgment is rendered, is not an equivalent of the citation. In this respect writs of error differ from appeals taken in open court. *U. S. v. Phillips*, 121 U. S. 254; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127.

The citation should be addressed to the defendant in error; *Peale vs. Phipps*, 8 How. 256; and signed by a judge of the trial court or a judge or justice of the Appellate Court; R. S. sec. 999; *Sage vs. R. R. Co.*, 96 U. S. 712. No mandamus will issue to compel a judge to sign a citation. *Ex parte Virginia Commissioners*, 112 U. S. 177.

The citation should be returnable within thirty days from the date of signing. Rule 14 C. C. A. A writ of error will not be dismissed if the citation is made returnable less than thirty days after the writ was granted. *Seagrist vs. Crabtree*, 127 U. S. 773. Where a writ of error is seasonably returned and docketed in the Court of Appeals in vacation, an *alias* citation may issue at the next ensuing term at which the writ was allowed. *Altenberg vs. Grant*, 83 Fed. Rep. 980, 28 C. C. A. 244.

The citation must be served before the return day. Rule 14 C. C. A.; *Nat'l Bank vs. Bank of Commerce*, 99 U. S. 608. The service of a citation may be made upon the attorney of the defendant in error in the suit below. *Bacon vs. Hart*, 1 Black. 38; *Bigler vs. Waller*, 12 Wall. 142, even though the attorney has withdrawn from the case; *U. S. vs. Curry*, 6 How. 106. As to service upon a partner see *R. R. Co. vs. Blair*, 100 U. S. 661; on an executrix of a deceased attorney of record. *Bacon vs. Hart*, 1 Black. 38, on one of two joint parties, *Waters vs. Barrill*, 131 U. S. 1xxxiv. Service of copy of citation by mail is not sufficient. *Tripp vs. Santa Rosa Street Ry. Co.*, 144 U. S. 126.

The citation may be waived by a general appearance. *Villabolas vs. U. S.*, 6 How. 81, 90; *Sage vs. R. R. Co.*, 96 U. S. 712; or by acceptance of service of a defective citation. *Bigler vs. Waller*, 12 Wall. 142; or by action equivalent to acknowledgment of notice. *Goodwin vs. Fox*, 120 U. S. 775.

No. 1804.**Acceptance of Service of Citation by Attorney (1).**

I hereby, this — day of —, accept due personal service of this citation on behalf of C. D. and W. L., appellees.

Y. & Y.,
Solicitors for Appellees.

(1) *Villabolas vs. U. S.*, 6 How. 81, 90; *Andrews vs. National Foundry & Pipe Works*, 77 Fed. Rep. 774, 23 C. C. A. 454; *McClellan vs. Pyeatt*, 49 Fed. Rep. 259, 1 C. C. A. 241; *Bigler vs. Waller*, 12 Wall. 142.

No. 1805.**Affidavit of Service of Citation (1).**

State of —,
County of —, ss.

On this — day of —, 1894, personally appeared before me, a notary public in and for said county, —, and made oath that he delivered a copy of within citation to C. D.

Sworn to and subscribed before me this — day of —, 1894.

[Seal.] J. N.,
Notary Public in and for the State
and County aforesaid.

(1) This affidavit may be used when service is not accepted. The citation may be served by the U. S. Marshal or other person. The usual practice is for counsel to accept service in writing on the citation. *Bigler vs. Waller*, 12 Wall. 142.

An affidavit that copy of citation was sent by mail is not sufficient. *Trip vs. Santa Rosa Street R. R. Co.*, 144 U. S. 126.

No. 1806.

Assignment of Errors.

The District Court of the United States,
for the — District of —.

| | | |
|-------------------|---|-----------------------|
| A. B., Plaintiff, | } | At Law. |
| <i>vs.</i> | | Assignment of Errors. |
| C. D., Defendant. | | |

The plaintiff [*or*, defendant] in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the cause, to wit:

I. The court erred in the rejection of evidence offered by the plaintiff, [*or*, defendant] upon said trial in the following instances, to wit:

(1) In rejecting portions of the evidence of W. B., given by deposition, which evidence was in substance [*here set forth the substance of the deposition*].

(2) In excluding from the testimony of L. H., a witness produced in court and sworn on behalf of the plaintiff [*or*, defendant], this testimony being in substance [*set forth in substance what he testified*].

II. The court erred in the admission of evidence offered by the defendant [*or*, plaintiff] in the following instances, to wit:

(1) In the testimony given by J. S., in substance [*set forth the substance of the testimony*].

(2) In the testimony given by the defendant [*or*, plaintiff] as a witness in his own behalf upon the trial, in substance [*set forth the substance of the testimony*]; also, in answering the questions put to him by his own attorney [*quote the question*] by saying [*quote the answer*].

III. The court erred in making the charge to the jury in refusing to state propositions requested by the plaintiff [*or*, defendant] in the following instances, to wit [*set forth in full the propositions*].

IV. The court erred in using the following language in the charge to the jury [*set forth that part of the charge in which error is charged.*]

Wherefore the plaintiff [*or defendant*] prays that the judgment of the District Court may be reversed.

X. & X.,

Attorneys for Plaintiff [*or, Defendant*].

(1) A writ of error will not be allowed until the plaintiff in error files with the clerk of the court below an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. Rule 11 C. C. A., R. S., Sec. 997. *U. S. v. Goodrich*, 54 Fed. 21; 4 C. C. A. 160; *Crabtree v. McCurtin*, 61 Fed. 808, 10 C. C. A. 86; *Mutual Life Ins. Co. v. Conoley*, 63 Fed. 180, 11 C. C. A. 116.

The assignment of errors should be entitled in the District Court and not in the Court of Appeals. The case is pending in the lower court until the writ of error is sued out and filed in that court, therefore all papers and proceedings are taken in that court until its jurisdiction is ended by the filing of the writ.

Where no assignment of error is filed a judgment will be affirmed unless fundamental error appears upon the face of the record. *Stevenson v. Barbour*, 140 U. S. 48; *Rowe v. Phelps*, 152 U. S. 87. Errors not assigned according to Rule 11 will be disregarded, but the court, at its option, may notice a plain error not assigned. *Natl. Accident Society v. Spiro*, 78 Fed. 774, 24 C. C. A. 334; *Central Imp. Co. v. Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121.

Each error thus assigned must be founded upon an exception properly taken at the time of the trial or it will be disregarded. *Merchants' Ins. Co. v. Buckner*, 110 Fed. 345, 49 C. C. A. 80; *Balt. & O. R. Co. v. Hellenenthal*, 88 Fed. 116, 31 C. C. A. 414. *Toplitz v. Heddon*, 146 U. S. 252.

A motion to affirm will be granted where the assignment of errors are frivolous and the court is convinced the writ of error was taken only for delay. *Blythe v. Hinckley*, 180 U. S. 333, 338.

An assignment of error as a mere general claim that the judgment was rendered for the wrong party is insufficient. *Deering Harv. Co. v. Kelley*, 103 Fed. 261, 43 C. C. A. 225; *R. R. Co. v. Cutting*, 16 C. C. A. 597, 68 Fed. 586; *Hart v. Bowen*, 86 Fed. 877, 31 C. C. A. 31; *U. S. v. Ferguson*, 78 Fed. 103, 24 C. C. A. 1; *Doe v. Mining Co.*, 70 Fed. 455, 17 C. C. A. 190; see also, *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, 73 C. C. A. 425; *Crosby v. Emerson*, 142 Fed. 713, 74 C. C. A. 45.

Every separate exception intended to be urged as error should be made the subject of a distinct specification in the assignment of errors and no specification should embrace more than one exception. *U. S. v. Indian Grave Drainage Dist.*, 85 Fed. 928, 29 C. C. A. 578; *Vider v. O'Brien*, 62 Fed. 326, 10 C. C. A. 385.

The assignment of errors should contain a separate specification under each count of the declaration upon which the right to go to the jury is asserted where the exception was to a ruling directing a verdict. *Russell v. Mfg. Co.*, 83 Fed. 976, 28 C. C. A. 243.

The refusal to grant a new trial is not assignable error. *R. R. Co. v. Heck*, 102 U. S. 120; *Condran v. R. R. Co.*, 67 Fed. 522, 14 C. C. A. 506; *City of Manning v. German Ins. Co.*, 107 Fed. 52, 46 C. C. A. 144.

A ruling by the trial court on a plea in abatement is not reviewable by writ of error. *U. S. R. S., Sec. 1011*; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515.

The assignment of errors must be on file at the time when the writ of error is taken out and the citation issued. *Alaska, etc., Co. v. Muset*, 114 Fed. 66, 52 C. C. A. 14. Rule 11 of C. C. A.

Appellant's failure to file with the clerk of the trial court an assignment of errors before the appeal is allowed, as required by Rule 11, is not ground for dismissal. The rule is directory and its requirements are not jurisdictional. *Hultberg v. Anderson*, 203 Fed. 853.

The question of excessive damages awarded by the verdict in the trial court can not be raised on error, but must be reviewed only on a motion for a new trial. *R. R. Co. v. Winter's Admr.*, 143 U. S., 60, 36 L. Ed. 71.

As to error proceedings where the case was tried by the court without a jury, see *Natl. Bank of Commerce v. First N. Bk.*, 61 Fed. 809, 10 C. C. A. 87; *Paul v. D., L. & W. R. R. Co.*, 130 Fed. 951.

No. 1807.**Assignment of Error.(1)****[Caption.]**

Now comes the said plaintiff, A. B., and assigns error in the decision of said District Court as follows:

First. Said court erred in sustaining the motion of the defendant, The C. & D. Railroad Company, to direct the jury to render a verdict for the defendant and against this plaintiff.

Second. Said court erred in that part of its charge to the jury in which it said "Under such conditions it is my duty to direct you to render a verdict for the defendant, and that I accordingly do."

Third. The court erred in charging the jury as follows: "Conceding that the brakeman was guilty of negligence which proximately caused this accident, and which you would at least be very well warranted in finding in this case, nevertheless, as a matter of law, the Railroad Company is not responsible for his negligence. It is a case of one fellow-servant hurting another, and unless the master knew that the brakeman was incompetent when it employed him, or afterwards knew or ought to have known the fact, it is not responsible for his negligence, in my opinion."

Fourth. Said court erred in charging the jury as follows: "I do not have any hesitancy in withdrawing this case from you so far as it is predicated upon the idea that the engineer or the conductor has been shown to be guilty of negligence by any substantial testimony."

Wherefore, the plaintiff, A. B., prays that the judgment of the District Court of the United States for the — District of —, be reversed, and that said District Court be directed to grant a new trial of the said cause.

X. & X.,

Attorneys for Plaintiff.

(1) See note to Form No. 1806, Rule 11 C. C. A.; R. S., Sec. 997, 1012; *Simpson v. First Natl. Bk.*, 129 Fed. 257, 63 C. C. A. 371. Supreme Court Rules 21, Secs. 2 and 4.

No. 1808.**Assignment of Errors, Verdict Directed by the Court.(1)****[Caption.]**

Now comes the plaintiff, A. B., in the above entitled cause, and assigns errors in the trial and decision of said District Court in the said cause, as follows:

First. Said court erred in sustaining the motion made by counsel for defendant in error, that the court direct the jury to return a verdict in its favor made upon the conclusion of the introduction of all of the testimony introduced upon the trial of the case.

Second. Said court erred in charging the jury to return a verdict for the defendant.

Third. Said court erred in not submitting for determination the issues between the parties, to the jury.

Wherefore, the said A. B., plaintiff in error prays that the judgment of the Circuit Court of the United States for the — District of —, in this case entered, be reversed and that said District Court be directed to grant a new trial of said cause.

R. X.,

Attorney for Plaintiff.

(1) See note to Form No. 1806.

A specification of error that "a court erred in taking the case from the jury and directing a verdict for the defendant" is sufficient under Rule 11 C. C. A. *Russell v. Bohn Mfg. Co.*, 83 Fed. 976, 28 C. C. A. 243; *Atchison, etc., R. Co. v. Meyers*, 76 Fed. 443, 22 C. C. A. 268; *Leslie v. Sewing Mach. Co.*, 98 Fed. 827, 39 C. C. A. 314. But see *Supreme Lodge, etc., v. Withers*, 89 Fed. 160, 32 C. C. A. 182. See also, 125 Fed. 181, 60 C. C. A. 123.

No. 1809.**Assignment of Errors to Instructions Refused and Given (1).**

[Caption.]

Now comes the defendant, the C. & D. Railway Company, and, in connection with its petition for writ of error herein, makes the following assignment of errors, which it states occurred upon the trial:

First. The court erred in refusing to give the following special charge tendered by the defendant, to wit:

(*Set it out in haec verba.*)

Second. The court erred in refusing to give the following special charge tendered by the defendant, to wit:

(*Set it out in haec verba.*)

Third. The court erred in using the following language in the general charge which it delivered to the jury, to wit:

(*Set it out in haec verba.*)

Fourth. The court erred in each and every particular of its general charge in this to wit, that the court should have withdrawn the issues from the jury and directed a verdict for the defendant.

Wherefore, the plaintiff in error prays that the judgment of said District Court may be reversed.

R. X.,

Attorney for Plaintiff in Error.

(1) See note to Form No. 1806.

An assignment of error that the court "erred in adopting the theory announced throughout the instructions" as to, etc., is too general to be considered. *Bogk vs. Gassert*, 149 U. S. 17. The specification of error in giving or refusing instructions should set out the part referred to in full. *McClellan vs. Pyeatt*, 50 Fed. Rep. 686, 1 C. C. A. 613; *Haldane vs. U. S.*, 69 Fed. Rep. 819, 16 C. C. A. 447; *Mitchell vs. Marker*, 62 Fed. Rep. 139, 10 C. C. A. 306; *Stewart vs. Morris*, 96 Fed. Rep. 703, 37 C. C. A. 562.

The court will not consider assignments of error which designate several instructions by number and allege error generally in the refusal to give all of them. *New Orleans, etc., R. Co. vs. Clements*, 100 Fed. Rep. 415, 40 C. C. A. 465. *Sutherland vs. Brace*, 71 Fed. Rep. 469, 18 C. C. A. 199; *Atchison, etc., R. Co. vs. Mulligan*, 67 Fed. Rep. 569, 14 C. C. A. 547.

Assignments of error in relation to instructions asked and refused must quote or refer to the evidence that shows a relevancy to the propositions of law propounded therein. *Newman vs. Iron Co.*, 80 Fed. Rep. 228, 25 C. C. A. 382; *Improvement Co. vs. Frari*, 58 Fed. Rep. 171, 7 C. C. A. 149.

No. 1810.

Assignment of Errors to Instruction for Defendant Because Relief was Equitable (1).

[*Caption.*]

Now comes the said plaintiff and says that in proceedings, record and judgment in said cause there is manifest error and for assignment thereof says:

First. The court erred in ruling in said cause and deciding it to be the law of the cause that the plaintiff's remedy is by a suit in equity and that this suit at law is not an appropriate remedy for the purpose.

Second. The court erred in charging the jury: "Entertaining these views the court will instruct the jury in this case that for the reason that the remedy is one which ought and must in right be pursued in a court of equity and not in a court of law, the plaintiff can not recover in this case."

Third. The court erred in charging the jury that the plaintiff could not recover and instructing them to render a verdict in favor of defendant.

Wherefore, the plaintiff prays that the judgment may be reversed.

R. S.,

Attorney for Plaintiff.

(1) See note to Forms Nos. 1806 and 1809.

No. 1811.

Assignment of Errors Founded on the Charge to the Jury (1).

[*Caption.*]

The C. D. Co., the defendant in this action, in connection with its petition for a writ of error, makes the following as-

signment of error, which it avers occurred upon the trial of the cause, to wit: (1)

First. The court erred in refusing to charge the jury, as requested by said defendant in its request Number I, which is as follows, to wit:

"1. Upon the whole evidence the plaintiff is not entitled to recover, and the verdict must be for the defendant."

Second. The court erred in refusing to charge the jury, as requested by said defendant in its request Number 2, which is as follows, to wit:

[Here set out the request and continue in like manner to set out the other requests denied.]

Third. The court erred in using the following language in its charge to the jury, to wit: (1)

[Here set out the particular words used.]

Fourth. The court erred in using the following language in its charge to the jury, to wit:

[Here set out the particular words used as before and continue in like manner to set out all of the parts of the charge objected to.]

Wherefore, the defendant prays that the said judgment may be reversed.

The C. & D. Co.,
By R. H., Its Attorney.

(1) See note to Form No. 1806, Rule 11 C. C. A.; R. S., Sec. 997, 1012, and Supreme Court Rule 21, Secs. 2 and 4.

When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. An assignment that the court erred in its charge, etc., referring to marked lines and numbers in the written opinion for instructions given and refused will not be considered. *Gallot v. U. S.*, 87 Fed. 446, 31 C. C. A. 44; *Pickham v. Wheeler-Bliss Mfg. Co.*, 77 Fed. 663, 23 C. C. A. 391.

No. 1812.**Assignment of Errors to Rulings on Admissibility of Testimony (1).**

[Caption.]

Now comes the defendant, by R. Y., its attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

First. In permitting the witness, B. F., to answer the following question: "What authority at the time of the dates of those several checks, did R. C. have in the matter of endorsing checks or bills and such for your company?" and in overruling defendant's objection thereto.

Second. In permitting witness, C. B., to answer the following question: "As a matter of fact, what was it that precipitated his leaving your employ," and in overruling defendant's objection thereto.

Third. In permitting witness, C. B., to answer the following question: "Was that information communicated to Rogers?"

Fourth. In permitting the following question to be asked witness C. B. and receiving his answer thereto: "Now, go on and tell us what was communicated to Rogers?"

Fifth. In refusing the following question to be asked the witness G. B.: "Will you state how you came to accept that endorsement?"

Sixth. In permitting the letter, Exhibit 121, to be read in evidence.

Seventh. In permitting the witness, S. R., to answer the following question: "Did you question that explanation?"

Eighth. In receiving Exhibit 124 in evidence.

Ninth. In directing that the jury find a verdict for plaintiff for the full amount claimed.

Wherefore, defendant prays that said judgment be reversed.

R. Y.,

Attorney for Defendant.

(1) See C. C. A. Rule 11 and cases collected, 90 Fed. 146.

See note to No. 1806.

An assignment of error as to the admission or rejection of evidence must set out the full substance of the evidence admitted or rejected. *Am. Nat'l Bank vs. Nat'l Wall Paper Co.*, 77 Fed. Rep. 85, 23 C. C. A. 33; *Lincoln Sav. Bank, etc., Co. vs. Allen*, 82 Fed. Rep. 148, 27 C. C. A. 87.

Each ruling with reference to evidence should be made a separate assignment of error. *Lafin vs. Shackelford*, 98 Fed. Rep. 372, 39 C. C. A. 102.

Where a witness is not permitted to answer a question the assignment of error should set out the full substance of the excepted answer. *U. S. vs. Indian Grave Drainage Dist.*, 85 Fed. Rep. 928, 29 C. C. A. 578.

An assignment that the court erred in admitting in evidence a certain paper "as set forth in the bill of exceptions" is insufficient. *Atlas Distilling Co. vs. Rheinstrom*, 86 Fed. Rep. 244, 30 C. C. A. 10.

An assignment of error "in excluding legal and proper evidence offered by" or "in admitting illegal and improper evidence" is insufficient. *Nat'l Bank of Commerce vs. First Nat'l Bank*, 61 Fed. Rep. 809, 10 C. C. A. 87.

No. 1813.

Assignment of Errors to a Judgment Sustaining a Demurrer to Petition.(1)

The District Court of the United States,

— District of —.

The A. B. Company, Plaintiff,

vs

The Board of County Commissioners

of — County, —, Defendant.

The A. B. Company, plaintiff in this action, in connection with and as part of its petition for a writ of error filed herein, makes the following assignment of errors which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing upon the record herein, that is to say:

First. The court erred in holding and deciding that the petition of plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

Second. The court erred in sustaining the demurrer of the defendant to the petition of the plaintiff.

Third. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of defendant.

Fourth. The court rendered judgment against this plaintiff, whereas judgment ought to have been rendered in favor of the plaintiff and against the defendant.

Wherefore, the plaintiff prays that the said judgment may be reversed.

The A. B. Company,
By X. & X., Its Attorneys.

(1) See note to No. 1806.

Where a demurrer is based on several grounds the assignment of errors should specify separately the particular ground or grounds of demurrer which it is claimed were wrongly ruled. *City of Anniston vs. Safe Deposit & Trust Co.*, 85 Fed. Rep. 856, 29 C. C. A. 457.

No. 1814.

Assignment of Errors to Judgment on Overruling Demurrer to Answer.

[*Caption.*]

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the hearing of this case, to wit:

First. The court erred in overruling the demurrer of plaintiff to the first and second defenses set up in the second amended answer of the defendant, and in overruling such demurrer to each of the said defenses.

Second. The court erred in sustaining the demurrer to the petition of the plaintiff with the amendment filed thereto.

Third. The court erred in refusing to grant this plaintiff leave to file his amended petition herein.

Fourth. The court erred in dismissing the plaintiff's petition, with the amendment thereto, and in entering final judgment upon said demurrer.

Fifth. The court erred in entering final judgment in said case against this plaintiff for costs.

Wherefore, the plaintiff prays that the said judgment be reversed.

R. X.,

Attorney for Plaintiff.

(1) See note to Form No. 1806, Rule 11 C. C. A., R. S., Sec. 997.

No. 1815.

**Assignment of Errors to Judgment for Writ of Mandamus to
Compel Levy of Taxes.(1)**

The District Court of the United States

For the — Division of the — District of —.

The United States on relation of R. J.,

Receiver, etc.,

vs.

City of —.

Now come the defendants and, in connection with their petition for writ of error, assign the following errors in the action and proceedings of the said District Court in said cause:

First. The court erred in holding and adjudging that defendants' return to the alternative writ of mandamus presented no valid or sufficient defense to the issuance of a peremptory writ as prayed in the relator's petition.

Second. The court erred in adjudging defendants' return insufficient, and sustaining demurrer to the same.

Third. The court erred in awarding peremptory writ of mandamus.

Fourth. The court erred in holding that "the power to make a valid contract for a public use by a municipal corporation, carries with it by implication the power to satisfy a judgment based on that contract by the levy of a tax."

Fifth. The court erred in holding that defendant's return was subject to demurrer because of its failure to set out the facts regarding its tax levies with sufficient fullness. The court

should have held that such objection could only be made by a motion to make the answer more specific, and that it could not be made by demurrer.

Sixth. The court erred in not holding and adjudging that defendant city had no power to levy a tax for the payment of the relator's judgment.

Seventh. The court erred in not holding and adjudging that the return showed that defendant city had exhausted its power of taxation for the present year, and had no power to levy any further tax.

Eighth. The court erred in not holding and adjudging that relator's judgment could only be paid out of the revenues realized by defendant city from the taxes which it was authorized to levy for general purposes, and that no tax in excess of the rate to which said defendant is limited by law for general purposes could be levied by defendant for payment of said judgment.

Ninth. The court erred in not holding and adjudging that defendant city had no power to levy a tax in excess of seventy-five cents on the one hundred dollars for any one year, and that it had already levied that amount for the present year prior to the issuance of the alternative writ of mandamus.

Wherefore, defendants pray that said errors be corrected and the judgment of the District Court reversed.

X. & X.,

Attorneys for Defendants.

(1) See note to Form No. 1806, Rule 11 C. C. A., R. S., Sec. 997, 1012, and Supreme Court Rule 21, Secs. 2 and 4.

A judgment granting or refusing a writ of mandamus is reviewable on writ of error and not appeal. *Muhlenburg County v. Dyer*, 13 C. A. 664, 65 Fed. 634.

**WRIT OF ERROR FROM THE SUPREME COURT TO
A DISTRICT COURT.(1)**

No. 1816.

**Petition for Writ of Error from the Supreme Court of the
United States to the District Court.(2)**

The District Court of the United States
For the — District of —.

| | | |
|---|---|--|
| A. B., Plaintiff in Error, vs. C. D., Defendant in Error. | } | Petition for Writ of Error. At Law. |
|---|---|--|

And now comes A. B., plaintiff [*or* defendant] herein and says:

That on or about the — day of —, the District Court entered a judgment herein in favor of the defendant [*or* plaintiff] and against this plaintiff [*or* defendant] in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff [*or* defendant], all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff [*or* defendant] prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

R. X.,

Attorney for Plaintiff [*or* Defendant].

(1) This jurisdiction is given to the Supreme Court in Judicial Code, Sec. 238, which brings forward in general Sec. 5 of the Circuit Court of Appeals Act of March 3, 1891, and exists in the five cases there enumerated. Similar jurisdiction is conferred upon the Supreme Court in the cases stated below, namely:

River and Harbor Appropriations Act, March 3, 1899, 30 Stat. L. 1153; Interstate Commerce Act of February 19, 1903, 32 Stat. L. 894, Sec. 3, proviso; Trade Combinations and Trusts Act, February 11, 1903, 32 Stat. L. 823, Sec. 2; Criminal Appeals Act, March 2, 1907, 34 Stat. L. 1246; Act Abolishing the Commerce Court, October 22, 1913, 38 Stat. L. 220, contained in the Deficiencies Appropriation Act; Cases arising under Judicial Code, Secs. 181, 242 and 243 (C. Cls.); Tucker Act, March 3, 1887, 24 Stat. L. 506.

(2) This petition should be entitled and filed in the court in which the trial was had and an assignment of errors filed with the petition. Supreme Court Rule 35. A formal petition is not absolutely necessary. *Davidson v. Lanier*, 4 Wall. 447; *Ex parte Virginia Commissioners*, 112 U. S. 177.

A writ of error may be allowed in term time or in vacation by any justice of the Supreme Court or by any judge of the District Court within his district, or any circuit judge assigned to the District Court. Supreme Court Rule 36, but the application should not be made to the Supreme Court en banc. *In re Ingalls*, 139 U. S. 548.

The time limit for a writ of error returnable to the Supreme Court is three months. R. S., Sec. 1008 is displaced by 39 Stat. L. 727. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68; *Allen v. So. Pac. Ry. Co.*, 173 U. S. 479. The time does not begin to run until a motion for new trial is disposed of. *Kingman v. Western Mfg. Co.*, 170 U. S. 675.

Actions at law can be brought to the Supreme Court only by writ of error and not by appeal. *Sarchet v. U. S.*, 12 Pet. 143; *Bevins v. Ramsey*, 11 How. 185; *U. S. v. Hailey*, 118 U. S. 233.

As to amending petition, see *In re Wright*, 134 U. S. 136.

A case may be removed from a District Court directly to the Supreme Court of the United States if the jurisdiction of District Court rests solely on the ground that the suit arises under the constitution, laws and treaties of the United States, *Am. Sugar Co. v. New Orleans*, 181 U. S. 277; or if after the jurisdiction of the District Court attaches on the ground of diverse citizenship issues are raised the decision of which brings the case within either of the classes set forth in Sec. 5 of the Act of March 3, 1891, 26 Stat. L. 826 (now Judicial Code, Sec. 238); *Loeb v. Columbia Trustees*, 179 U. S. 472. See page 2750, ante.

No. 1817.**Petition for Writ of Error from Supreme Court to District Court After Judgment in District Court on Mandate from Circuit Court of Appeals.**

[*Caption.*]

And now comes The Delaware, Lackawanna and Western Railroad Company, the plaintiff in error herein, and says:

That on or about the thirteenth day of May, 1914, the United States District Court for the Eastern District of New York entered judgment herein in favor of the defendant in error and against the plaintiff in error, for the sum of thirty-six thousand ninety-nine dollars and eighty cents (\$36,099.80), which said judgment and the proceedings of said District Court in relation thereto, all having been reviewed by the United States Circuit Court of Appeals for the Second Judicial District upon a writ of error, have been by said Circuit Court of Appeals, unanimously affirmed with costs by its decree made on January 22, 1915, and entered in the office of the clerk of said court on January 26, 1915, and a mandate having been issued to said District Court in accordance with said decree, an order of said Eastern District Court was entered in the office of its clerk on the 29th day of January, 1915, decreeing that the said judgment of the United States Circuit Court of Appeals in the Second Circuit be made the order and judgment of the said District Court and that the defendant in error have judgment against the plaintiff in error for the sum of twenty-five dollars (\$25.00) costs as taxed in the United States Circuit Court of Appeals, together with the sum of seventy cents (\$0.70), the clerk's fees on filing said mandate and filing and entering said order, amounting in all to the sum of twenty-five dollars and seventy cents (\$25.70), in which judgment and proceedings of the said Circuit Court of Appeals certain errors were committed to the prejudice of this plaintiff in error, all of which will appear in more detail in the assignment of errors which is filed with this petition.

Wherefore, the plaintiff in error prays that a writ of error may issue in this behalf from the United States Supreme Court for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Supreme Court.(1)

Dated, New York City, February 1, 1915.

A. B.,

C. D.,

Attorneys for The Delaware, Lackawanna and
Western Railroad Company.

(1) See *Union Trust Co. v. Westhus*, 228 U. S. 519, 57 L. Ed. 947; *Shapiro v. U. S.*, 235 U. S. 412, 59 L. Ed. 291.

Amendment of Writ of Error. A writ of error may be amended in the Supreme Court at any time on grounds set out in R. S. U. S., Sec. 1005, e. g., a writ not under the seal of the court issuing it, and not bearing teste of the date of issuance. *Alaska Mining Co. v. Keating*, 116 Fed. 561, 53 C. C. A. 655. A writ defective by reason of absence of party. *Gilbert v. Hopkins*, 198 Fed. 849, 117 C. C. A. 849; *Clinchfield Fuel Co. v. Titus*, 226 Fed. 574, 141 C. C. A. 330.

Where Both Parties Appeal Only One Record Needed. One record is sufficient where both parties appeal to the Supreme Court. R. S. U. S., Sec. 1013. This applies also to the Circuit Court of Appeals.

Certificate—Sufficiency. Where a certificate is made, see as to sufficiency *Bogart v. Sou. Pac. Ry. Co.*, 228 U. S. 137, 57 L. Ed. 768; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272; *Nenner v. G. N. Ry. Co.*, 209 U. S. 24, 52 L. Ed. 666.

Bill of Exception Upon Certificate. Good practice demands ordinarily a bill of exceptions when the question of jurisdiction is certified. *Nichols Lumber Co. v. Franson*, 203 U. S. 278, 51 L. Ed. 181; *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504.

Appellate Court Does not Issue Execution. R. S. U. S., Sec. 701, specifies the power of the Supreme Court of the United States over the judgment, etc. of the District Court, but prohibits Supreme Court from issuing execution, requiring the issue of a mandate to the inferior court for the awarding of execution. This is applied to the Circuit Court of Appeals by Sec. 11 of Act of March 3, 1891, 26 Stat. L. 727. *U. S. v. Ills. Surety Co.*, 226 Fed. 653, 141 C. C. A. 409.

Review Exclusively in Supreme Court—(a) When Only Federal Question Involved. Where there is no allegation of diversity of citizenship, or diversity is plainly absent, and the jurisdiction of the District Court is invoked solely on the ground that the suit arises under the constitution of the United States, the exclusive power of

review is vested in the Supreme Court. (Citing authorities, including *Carolina Glass Co. v. S. Ca.*, 240 U. S. 305, 318.) *Raton W. W. Co. v. Raton*, 249 U. S. 552, 63 L. Ed. 768.

(b) **When Tucker Act Involved.** The Supreme Court has exclusive jurisdiction to review by error proceedings the judgment of the District Court in a case of claim against the United States, provided for by the Tucker Act of March 3, 1887, 24 Stat. L. 505, and this exclusive jurisdiction was not disturbed by the Judicial Code. *Fritch v. U. S.*, 248 U. S. 458, 63 L. Ed. 359; following rulings in *U. S. v. Davis*, 131 U. S. 36, and *Reid v. U. S.*, 211 U. S. 529, and stating that there "can be no room whatever for difference of opinion that the effect of the ruling in *Reid v. U. S.* was to overrule the *Ogden case*" (148 U. S. 390); further stating at page 463 that in the case of *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228, there was a "mere inadvertent assumption of jurisdiction rather than a decision that such jurisdiction existed." (Here the claims case went to Circuit Court of Appeals, and on error to Supreme Court, and judgment affirmed.)

Judgment in Proceeding to Set Aside a Judgment Reviewable in Circuit Court of Appeals. A proceeding to set aside a default judgment in the court rendering it, on the ground of failure to serve process in the original action, is an independent action, and the jurisdiction of the District Court to entertain the proceeding has no relation to the jurisdiction over the original action; hence error for review on ground of no jurisdiction can not be prosecuted in Supreme Court under Judicial Code, Sec. 238. The remedy is by error to the Circuit Court of Appeals. *Stevirmac Oil Co. v. Dittman*, 245 U. S. 210, 62 L. Ed. 248.

Scope of Review. Where plaintiff in error claims that a construction placed upon a statute in the District Court renders it unconstitutional, the question in the Supreme Court is not only as to the construction and application of the statute, but of the scope of the sixteenth amendment under which the statute has authorization, and having jurisdiction in error on the latter ground, the Supreme Court will consider both. *Towne v. Eisner*, 245 U. S. 418, 425, 62 L. Ed. 372.

Where on error direct from the District Court to the Supreme Court in a criminal case involving constitutional issues, the constitutional questions are resolved against the plaintiff in error, the Supreme Court will nevertheless consider and pass upon the other questions raised. *Goldman v. U. S.*, 245 U. S. 474, 476, 62 L. Ed. 410; *Brolan v. U. S.*, 236 U. S. 216-218, 59 L. Ed. 544.

No Right to Mandamus where Error or Certiorari Provided for. Mandamus does not lie to control the District Court on constitutional question when error or certiorari are provided for review; and so held where a District Court refused to remand a case to a state court of another state whence it was wrongfully removed. Inconvenience and expense of the methods of review provided are not controlling. *Ex parte Park Square Automobile Station*, 244 U. S. 412, 61 L. Ed. 1231.

Criminal Appeals Act. Under the Criminal Appeals Act (March 2, 1907, 34 Stat. L. 1246), a writ of error from the Supreme Court to the District Court may be prosecuted by the United States unless the verdict is in favor of the defendant.

Under the Criminal Appeals Act the Supreme Court accepts the District Court's interpretation of the indictment and confines itself to that court's construction of the statute. *U. S. v. Colgate & Co.*, 250 U. S. 300, 63 L. Ed. 992.

No. 1818.

**Order Allowing Writ of Error from the Supreme Court to
a District Court.(1)**

The District Court of the United States
For the — District of —.

| | | |
|------------|---|---------|
| A. B., | } | At Law. |
| Plaintiff, | | |
| vs. | | |
| C. D., | | |
| Defendant. | | |

This — day of — comes the plaintiff [*or* defendant] by his attorney and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff [*or* defendant] giving bond according to law in the sum of \$—, which shall operate as a superseas bond.

(1) A writ of error may be allowed by a justice of the Supreme Court, a circuit judge assigned to the District Court, or a district judge within his district. Supreme Court Rule 36.

No. 1819.**Writ of Error from the Supreme Court to a District Court.(1)**

The United States of America, ss.

The President of the United States of America to the Judges
of the District Court of the United States for the —
District of —, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between A. B., plaintiff, and C. D., defendant, a manifest error has happened, to the great damage of the said A. B. [*or*, C. D.], as by his complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the — day of — next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, chief justice of the United States, the — day of —, in the year of our Lord one thousand eight hundred and ninety —, and of the independence of the United States of America the one hundred and —.

[*Seal.*]

B. R.,

Clerk of the District Court of the United

Allowed by States for the — District of —.

H. S.,

District Judge [*or as may be*].

(1) A writ of error may be allowed by a justice of the Supreme Court, or a circuit judge assigned to a district, or by any district judge within his district, the proper security to be taken and the citation signed by him; and he may also grant a supersedeas and stay of execution or all proceedings pending such writ of error. Supreme Court Rule 36.

A writ of error is regularly allowed by a judge or justice, but it is enough that it is issued and served by a copy lodged with the clerk of the court to which it is directed. *Davidson v. Lanier*, 4 Wall. 447; *Ex parte Virginia Commissioners*, 112 U. S. 177.

It is well settled that cases at law can be brought to the Supreme Court only by writ of error. *Sarchet v. U. S.*, 12 Pet. 143; *Bevins v. Ramsey*, 11 How. 185; *Burrows v. Carrow*, 15 Wall. 682; *Stringfellow v. Cain*, 99 U. S. 610; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *Hecht v. Boughton*, 105 U. S. 235; *Wolf v. Hamilton*, 108 U. S. 15; *U. S. v. Hailey*, 118 U. S. 233.

Jurisdiction does not depend upon the amount in dispute in cases taken by writ of error or appeal from the District Courts to the Supreme Court of the United States under the Act of March 3, 1891 (now contained in the Judicial Code). *The Paquete Habana*, 175 U. S. 683.

A writ of error is sued out within the meaning of the statute when it is filed in the clerk's office. "It is the filing of the writ that removes the record from the inferior to the Appellate Court," is the declaration of the Supreme Court as early as the year 1850, and which has been repeated in numerous cases. *Brooks v. Norris*, 11 How. 204-207; *Musina v. Cavazos*, 6 Wall. 355; *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. 877; *Polleys v. Improvement Co.*, 113 U. S. 81, 5 Sup. Ct. 369; *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 260, 9 Sup. Ct. 107.

Where a judgment is rendered against two or more jointly, all must join in suing out the writ of error, unless those who have joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record, before a writ of error by less than the whole can be allowed. *Masterson v. Herndon*, 10 Wall. 416; *Simpson v. Greeley*, 20 Wall. 152; *Estis v. Trabue*, 128 U. S. 225; *Hardee v. Wilson*, 146 U. S. 179; *Davis v. Mercantile Trust Co.*, 152 U. S. 590; *Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123.

But where judgment in a District Court is rendered against several persons it is not necessary for all of them to join in prosecuting a writ of error, where the judgment is final or separable. *Hanrick v. Patrick*, 119 U. S. 156, 164; *Germain v. Mason*, 12 Wall. 259; *Cox v. U. S.*, 6 Pet. 172.

The time limit for a writ of error returnable to the Supreme Court of the United States is three months after a final judgment is rendered. 39 Stat. L. 727, Act of Sept. 6, 1916.

A writ of error should be made returnable not exceeding thirty days from the signing of the citation. Supreme Court Rule 8, except where time is extended to sixty days therein.

Writs of error returnable to the Supreme Court may be issued by the clerks of the District Courts. R. S. Sec. 1004; see *Ex parte Ralston*, 119 U. S. 613. Even when signed by a justice of the Supreme Court. *In re Classen*, 140 U. S. 200, 205.

As to amending writs of error in the Supreme Court, see R. S. Sec. 1005; *Estis v. Trabue*, 128 U. S. 225; *Evans v. Brown*, 109 U. S. 180; *Tex. Pac. Ry. Co. v. Kirk*, 111 U. S. 486; *Walton v. Chair Co.*, 157 U. S. 342.

No. 1820.

Summons and Severance.

For form of summons and severance see Form No. 1796.

No. 1821.

Certificate of Judge that a Question of Jurisdiction is in Issue Under Judicial Code, Sec. 238.

[Caption in Trial Court.]

In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the declaration, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or constitution; and that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and Constitution of the United States there is consequently no jurisdiction of the District Court of the United States.

This certificate is made conformably to Judicial Code, Sec. 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

This — day of —, A. D. —. C. D.,

District Judge holding the District Court of the United
States for the — District of —.

(1) A certificate from the court below specifying the question of jurisdiction to be decided is absolutely necessary for the exercise of jurisdiction by the Supreme Court on a writ of error or appeal removing a case from a District Court under the first clause of Sec. 5 of the Act of March 3, 1891, 26 Stat. at L. 826 (now Judicial Code, Sec. 238). *Davis v. Geissler*, 162 U. S. 290, and cases there collated.

Where the record shows that the only matter tried and decided in the court below, and the petition for writ of error or appeal asked only for the review of the judgment on the jurisdictional question, it has been held to be a sufficient certificate. *Excelsior Co. v. Pacific Bridge Co.*, 185 U. S. 285; *Imp. Co. v. Gibney*, 160 U. S. 217; *Shields v. Coleman*, 157 U. S. 168; *Smith v. McKay*, 161 U. S. 355.

This certificate must be granted during the term at which the judgment or decree was entered. *The Bayonne*, 159 U. S. 687; *Colvin v. Jacksonville*, 158 U. S. 456.

Where the jurisdiction of the District Court depends upon diverse citizenship, the only question that can be considered by the Supreme Court on a writ of error to the District Court is whether or not the District Court had jurisdiction. *Shunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500; *McLish v. Roff*, 141 U. S. 661.

Such cases are entitled to be advanced in the Supreme Court on motion. Supreme Court Rule 32.

No. 1822.

Certificate of Judge that Question of Jurisdiction Under the Patent Laws is in Issue Under Judicial Code, Sec. 238.

[Caption in Trial Court.]

In this case I hereby certify that the judgment of dismissal herein is based solely on the ground that the cause set forth in the declaration in my opinion is not one arising under the patent laws of the United States, and no other ground of jurisdiction appears from the record in this case, and that the case is dismissed for want of jurisdiction for the reason above stated.

This certificate is made conformably to Judicial Code, Sec. 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.

Dated this — day of —, A. D. —.

C. D.,

District Judge holding the District Court of the
United States for the — District of —.

(1) See note to No. 1821.

No. 1823.**Certificate of Judge that Question of Jurisdiction Founded
Upon Diverse Citizenship is in Issue Under Judicial
Code, Sec. 238.**

[Caption in Trial Court.]

In this cause I hereby certify that the judgment of dismissal herein made is based solely on the ground that the record does not show that the controversy involved is one, in my opinion, between citizens of different states, but that it appears from the record that some of the defendants and some of the plaintiffs are in fact citizens of the same state, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reason above stated, that is, that the controversy is not between citizens of different states and consequently the Circuit Court of the United States has no jurisdiction.

This certificate is made conformably to the Judicial Code, Sec. 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.

Dated this — day of —, A. D. —.

W. T.,

United States District Judge.

(1) See note to No. 1821.

No. 1824.**Bond on Writ of Error from the Supreme Court to a
District Court.(1)**

Know all men by these presents, that we, A. B., as principal, and S. R. and G. P., as sureties, are held and firmly bound unto C. D. and E. F. in the full and just sum of — dollars (\$—) to be paid to the said C. D. and E. F., their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally,

by these presents. Sealed with our seals and dated this — day of —, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a District Court of the United States in a suit pending in said court, between A. B., plaintiff and C. D. and E. F., defendants, a judgment was rendered against the said A. B., and the said A. B. having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. D. and E. F., citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the — day of — next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

S. S.,

A. B., [Seal.]

T. T.

S. R., [Seal.]

G. P., [Seal.]

Approved by H. S.,

Justice of the Supreme Court.

(1) The bond on writ of error or an appeal removing a case from a District Court to the Supreme Court of the United States may be allowed by any justice of the Supreme Court, or by any district judge within his district, or any circuit judge assigned to the District Court. Supreme Court Rule 36.

As to form of bond and its effect as a supersedeas, see note to Form No. 1797.

No. 1825.

Citation to Defendant in Error.(1)

The United States of America, ss.

To C. D., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the

city of Washington, on the — day of — next(2), pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the — District of —, wherein A. B. is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of —, in the district above named, this — day of —, in the year of our Lord one thousand eight hundred and —. J. S.,

Judge of the District Court of the United States for the — District of —.

(1) A citation is essential. R. S., Sec. 999. Notice of a writ of error given in open court at the same term the judgment is rendered is not equivalent to the citation. In this respect writs of error differ from appeals taken in open court. *U. S. v. Phillips*, 121 U. S. 254.

The citation should be addressed to the defendant in error, *Peale v. Phipps*, 8 How. 256; and signed by a judge of the Supreme Court, or a circuit judge assigned to the District Court, or any district judge within his district. Supreme Court Rule 36; *In re Classen*, 140 U. S. 200.

The citation should be returnable within thirty days from the date of signing it, whether the return day fall within vacation or term time, and be served before the return day. Supreme Court Rule 8, paragraph 5, which also provides for exceptions. A writ of error will not be dismissed if a citation is made returnable less than thirty days after the writ was granted. *Seagrist v. Crabtree*, 127 U. S. 773.

The citation must be served before the return day. Supreme Court Rule 8, paragraph 5; *Nat'l Bank v. Bank of Commerce*, 99 U. S. 608. The service of a citation may be made upon the attorney of the defendant in error in the suit below. *Bacon v. Hart*, 1 Black, 38; *Bigler v. Waller*, 12 Wall. 142, even though the attorney has withdrawn from the case. *U. S. v. Curry*, 6 How. 106. Service of a copy of the citation by mail is not sufficient. *Tripp v. Santa Rosa St. Ry. Co.*, 144 U. S. 126. In practice the citation is usually served upon counsel, who write upon it an acceptance of service. It may be served by the marshal or any other person and proof of service made in the record.

The citation may be waived by a general appearance. *Villabolas v. U. S.*, 6 How. 81, 90; *Sage v. R. Co.*, 96 U. S. 712; or by acceptance of service of a defective citation. *Bigler v. Waller*, 12 Wall. 142; or by giving equivalent to an acknowledgment of service. *Goodwin v. Fox*, 120 U. S. 775.

No. 1826.**Assignment of Errors in the Supreme Court of the United States.(1)**

[*Caption.*]

Of — term, in the year of our Lord one thousand nine hundred and —.

Afterwards, to-wit, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said A. B., by R. Y., his attorney, and says that in the record and proceedings aforesaid, there is manifest error in this, to-wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said C. D. to have or maintain his aforesaid action thereof against the said A. B.; there is also error in this, to-wit, that by the record aforesaid, it appears that the judgment aforesaid given was given for the said C. D., against the said A. B., whereas, by the law of the land, the said judgment ought to have been given for the said A. B. against the said C. D., and the said A. B. prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, etc.

R. Y.,

Attorney for Plaintiff.

(1) A writ of error will not be allowed until the plaintiff in error files with the clerk of the court below, with his petition for writ of error, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. Supreme Court Rule 35.

The assignment of error should be entitled in the District Court and not in the Supreme Court. The case is pending in the lower court until the writ of error is sued out and filed in that court, therefore all papers and proceedings are taken in that court until its jurisdiction is ended by the filing of the writ.

Each error assigned must be founded upon an exception properly taken at the time of the trial or it will be disregarded. *Toplitz v. Hedden*, 146 U. S. 252, and cases cited on page 255. An assignment of errors can not be availed to import questions into a cause which the record does not show were raised in the court below and rulings

asked thereon. *Ansbro v. U. S.*, 159 U. S. 695. A motion to affirm will be granted where the assignment of errors is frivolous and the court is convinced the writ of error was taken only for delay. *Blythe v. Hinckley*, 180 U. S. 333, 338.

The refusal to grant a new trial is not assignable error. *R. R. Co. v. Heck*, 102 U. S. 120.

The form of assignment of errors used in removing a case from the District Court to a Circuit Court of Appeals may be employed in removing a case from the same court into the Supreme Court of the United States on writ of error. See Forms Nos. 1806 et seq.

No. 1827.

Assignment of Errors on Writ of Error from Supreme Court on Question of Jurisdiction of a District Court.(1)

The District Court of the United States

For the — District of —.

A. B.,

vs.

C. D.

} Assignment of Errors.

The plaintiff in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exists:

First. The court erred in sustaining the demurrer of the defendants.

Second. The court erred in dismissing plaintiff's suit.

Third. The court erred in conceiving that no Federal question was involved.

Fourth. The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

Fifth. The court erred in dismissing the suit of its own motion.

Wherefore, the plaintiff prays that said judgment be reversed.

X. & X.,

Attorneys for Plaintiff.

(1) See note to Form No. 1826.

An assignment of error can not be availed of to import questions into a case which the record does not show were raised in the court

below and rulings asked thereon, so as to give jurisdiction to the Supreme Court under Sec. 5 of the Act of March 3, 1891 (now Judicial Code, Sec. 238). *Ansbro v. U. S.*, 159 U. S. 695.

No. 1828.

**Assignment of Errors on Writ of Error from Supreme Court
on Question of Jurisdiction of District Court
(Another Form).(1)**

The District Court of the United States

— District of —

A. B.,

vs.

C. Railway Company.

Afterwards, to-wit, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, comes the said A. B. by R. X., his attorney, and says that, in the record and proceedings aforesaid, there is manifest error, in this, to-wit, that the declaration aforesaid and the matters therein contained are sufficient in law for the said A. B. to have and maintain his aforesaid action against the said C. D. Railway Company; also, that there is error therein, in this, to-wit: That, by the record aforesaid, it appears that the service of the summons and complaint upon M. D., president of the defendant company was, by an order dated the — day of —, set aside as wholly null and void, whereas, by the law of the land, the said service of the summons and complaint ought to have been sustained and held valid; and also, that there is error therein in this, to-wit: That the said District Court, by the law of the land, had and should have exercised jurisdiction of said action, whereas it denied that it had jurisdiction of the same; and the said A. B. prays that the setting aside of the service of the summons and complaint aforesaid be reversed, annulled

**WRIT OF ERROR FROM THE SUPREME COURT TO
A CIRCUIT COURT OF APPEALS.**

No. 1831.

**Petition for Writ of Error from the Supreme Court to a
Circuit Court of Appeals.(1)**

**United States Circuit Court of Appeals
for the ——— Circuit.**

| | |
|--|--|
| J. M. & Company, Plaintiffs in Error, | } Petition for Writ of Error. |
| vs. | |
| J. C. and C. M., Defendants in Error. | |

Your petitioners, J. M. & Co., plaintiffs in error in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for ——— Circuit, and that a judgment has therein been rendered on the ——— day of ———, affirming a judgment of the District Court of the United States for the ——— District of ———, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be allowed them in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the ——— Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said

plaintiffs in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

J. M. & Co.,
Plaintiffs in Error.
By R. X.,
Their Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of \$——.

DAVID J. BREWER,
Associate Justice of the Supreme Court
of the United States.

(1) This jurisdiction is based upon Judicial Code Sec. 241, which was brought forward from Sec. 6 of the Act of March 3, 1891, last paragraph thereof; the power of review extends to cases in which the judgment or decree of the Circuit Court of Appeals is not made final by the Judicial Code, and may be exercised as a matter of right by the party where more than one thousand dollars besides costs are involved.

This petition, together with an assignment of errors, should be filed with the clerk of the Circuit Court of Appeals.

The writ of error from the Supreme Court to a Circuit Court of Appeals may be allowed by a justice of the Supreme Court. In practice it is usually allowed by a judge of the Circuit Court of Appeals. The clerk of the Circuit Court of Appeals has authority to issue the writ, and likewise has the clerk of the Supreme Court, but not the clerk of the District Court. R. S. U. S., Sec. 1004, as amended by Act of January 22, 1912, 37 Stat. L. 54. See *In re Issuing Writs*, 199 Fed. 115, 117 C. C. A. 603; *Long v. Farmers' Bank*, 147 Fed. 360, 77 C. C. A. 538.

A writ of error from the Supreme Court to review a judgment of a Circuit Court of Appeals must be sued out within three months after the entry of the judgment sought to be reviewed. Act of September 6, 1916, 39 Stat. L. 727.

A writ of error lies to remove a case from the Circuit Court of Appeals to the Supreme Court as a matter of right in all cases in which the jurisdiction of the Circuit Court of Appeals is not made final by Judicial Code, Sec. 238, and the matter in controversy exceeds one thousand dollars besides costs. Judicial Code, Sec. 241; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 294; *Tex. & Pac. R. Co. v. Gentry*, 163 U. S. 353, 360; *Huntington v. Saunders*, 163 U. S. 319; *R. R. Co. v. Amato*, 144 U. S. 465; *U. S. v. Freight Assn.*, 166 U. S. 290.

Only final judgments and decrees of the Circuit Court of Appeals can be reviewed in the Supreme Court on appeal or writ of error. *Southern Ry. v. Postal Tel. Cable Co.*, 179 U. S. 641.

The amount in controversy on writ of error to remove a case from the Circuit Court of Appeals to the Supreme Court must exceed one thousand dollars besides costs, and this fact may be made to appear by affidavit after the case is in the Supreme Court or by stipulation of counsel. See *U. S. v. Freight Assn.*, 166 U. S. 310.

Mandamus to Circuit Court of Appeals by Supreme Court to Hear Case. The Supreme Court has jurisdiction to issue writ of mandamus to clerk of the Circuit Court of Appeals to permit a record from the District Court to be filed therein, when the Supreme Court has ultimate power to review the case. *Ex parte Abdu*, 247 U. S. 27, 28, 62 L. Ed. 966.

Case Removed Solely on Ground of Diversity of Citizenship can not be Reviewed in Supreme Court. Where a case in a state court involves both a federal question and diversity of citizenship, and is removed to the federal District Court solely on the ground of diversity of citizenship, and on error is reviewed by the Circuit Court of Appeals, error will not lie to the Supreme Court under Judicial Code, Secs. 128 and 241. *So. Pac. Ry. v. Stewart*, 245 U. S. 359, 365; 62 L. Ed. 345.

Review Under Act to Regulate Commerce. Cases brought under Sec. 16 of the Act to Regulate Commerce stand on a peculiar ground and may be reviewed by the Supreme Court on error to the Circuit Court of Appeals. *So. Pac. Co. v. Darnell Co.*, 245 U. S. 531, 535; 62 L. Ed. 451.

Actions at law were brought in the District Court, all arising under a law of the United States; the defendant had a partial equitable defense to all the actions and separate defenses to some, and by bill set forth the defenses, showed that nothing was in controversy beyond the defenses, and prayed adjudication in equity and injunction against further proceedings at law. The bill disclosed diversity of citizenship. Held, that the bill was dependent and ancillary and the jurisdiction to entertain it was referable to the actions at law, and hence the decree of the Circuit Court of Appeals was open to review in the Supreme Court on writ of error, under Judicial Code, Secs. 128 and 241. *Eichel v. Fidelity Co.*, 245 U. S. 102, 104; 62 L. Ed. 177.

No. 1832.

Petition for Writ of Error from Judgment of the District Court of Appeals by the Secretary of the Interior.

[Caption.]

Now comes Franklin K. Lane, Secretary of the Interior, the defendant and appellee in the above-entitled cause, and respectfully shows that on or about the 3d day of January, 1916, this court entered a judgment herein in favor of the appellant and against the appellee reversing the judgment

of the Supreme Court of the District of Columbia in favor of the appellee, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellee, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellee and defendant further shows that the judgment of the Court of Appeals of the District of Columbia in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 5 of Sec. 250 of the Judicial Code, in that the validity of an authority exercised by the appellee under the United States as Secretary of the Interior and the scope of power exercised by him as such Secretary of the Interior were drawn in question.

The appellee further shows that the judgment of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said Sec. 250 of the Judicial Code, in that the construction of an act of Congress—to-wit, the 7th section of the Act of March 3, 1891 (26 Stat. 1095)—was drawn in question by the appellee, who was the defendant below, who asserted and relied upon a construction of said statutes contrary to that placed thereon by the Court of Appeals in its judgment herein.

Wherefore, appellee prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the mandate of this court be stayed until further order.

By his attorneys:

FRANKLIN K. LANE,
Secretary of the Interior.

PRESTON C. WEST,
Solicitor for the Department of the Interior.

C. EDWARD WRIGHT,
Assistant Attorney.

No. 1833.**Writ of Error from the Supreme Court of the United States
to a Circuit Court of Appeals (1).**

United States of America, ss.

The President of the United States to the Honorable the Judges
of the United States Circuit Court of Appeals for the —
Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between J. M. & Co., plaintiffs in error, and J. C. and C. M., defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the — day of —, in the year of our Lord one thousand nine hundred and —.

[*Seal of the Supreme Court of the United States.*]

James H. McKenney,

Clerk of the Supreme Court of the United States.

Allowed by

David J. Brewer,

Associate Justice of the Supreme

Court of the United States.

(1) See note to petition for writ of error No. 1831.

No. 1834.**Bond on Writ of Error from the Supreme Court to a Circuit Court of Appeals (1).**

Know all men by these presents, that we, A. B., as principal, and C. B. and E. S., as sureties, are held and firmly bound unto C. D. in the full and just sum of — (\$—) dollars to be paid to the said C. D., his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of —, A. D. —, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a — Circuit Court of Appeals for the — Circuit in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a judgment was rendered against the said A. B., and the said A. B., having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. D. citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the — day of — next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

S. M.,

A. B., [Seal.]

R. T

C. B., [Seal.]

Approved by—

E. S., [Seal.]

David J. Brewer,

Associate Justice of the Supreme

Court of the United States.

(1) The form and manner of giving bond on writ of error from the Supreme Court of the United States to a Circuit Court of Appeals is the same as on writ of error to a District Court. See notes to Form No. 1797.

The bond should be approved by the justice of the Supreme Court who allows the writ.

With reference to superseding a judgment of a Circuit Court of Appeals, see *L. & N. R. R. Co. vs. Behlmer*, 169 U. S. 644.

No. 1835.

Citation to Appellee on Writ of Error from the Supreme Court to a Circuit Court of Appeals (1).

United States of America, ss.

The President of the United States to C. D., as receiver of the
— National Bank of —, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the — Circuit, wherein A. B. and E. B. are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, Justice of the Supreme Court of the United States, this — day of —, in the year of our Lord one thousand nine hundred and —.

Henry B. Brown.

Copy of writ served on us this — day of —, A. D. —.

S. R.,

R. Y.,

Attorneys for C. D., as Receiver.

(1) A citation directed to the defendants in error should be signed by the justice of the Supreme Court granting the writ of error.

The citation should be made returnable within thirty days from the

date of signing and served before the return day. Supreme Court rule 8, par. 5, except where the time has been extended by Supreme Court rule 9, par. 4.

No. 1836.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to Circuit Court of Appeals (1).

The United States Circuit Court of Appeals — Circuit.

A. D. and E. B., Plaintiffs in error,

vs.

C. D., as Receiver of the First National Bank, Defendant in error.

And now come the plaintiffs in error, A. B. and E. B., by B. X., their attorney, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the — Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiffs in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the — District of — for — dollars and — cents (\$—) and costs of suit, entered on —, in favor of said defendant in error and against said plaintiffs in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said District Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the 47th assignment of error upon the record in said cause.

Fourth. Said Circuit Court of Appeals erred in holding that the special findings of fact by the said District Court *was* sufficient to sustain the judgment rendered against plaintiffs in error.

Fifth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiffs in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Wherefore, the said A. B. and E. B., plaintiffs in error, pray that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiffs in error the said judgment of the said United States District Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the — District of —, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

R. X.,

Attorney for Plaintiffs in Error.

(1) The assignment of errors should be filed in the Circuit Court of Appeals before the writ of error is granted and should set out separately and distinctly each error to the decree of the Circuit Court of Appeals intended to be urged in the Supreme Court. No error will be considered by the Supreme Court unless assigned.

**WRIT OF ERROR FROM THE SUPREME COURT OF
THE UNITED STATES TO THE HIGHEST
COURT OF A STATE.**

No. 1837.

**Petition for Writ of Error from the Supreme Court to a State
Court (1).**

| | | |
|---|---|---------|
| The Supreme Court of the State of —. | } | At Law. |
| State of — <i>ex rel.</i> L. G., | | |
| vs. | | |
| Commissioners of Public Lands and O. D., as State Treasurer. | | |

The petition of the state of — *ex rel.* L. G., by R. X., at
torney, hereby sets forth that on or about the — day of —
A. D. —, the Supreme Court of the state of — made and
entered a final order and judgment herein in favor of the com-
missioners of Public Lands and O. D., as state treasurer, and
against state of — *ex rel.* L. G., in which final order and
judgment and the proceedings had prior thereunto in this cause
certain errors were committed to the prejudice of state of —
ex rel. L. G., all of which will more in detail appear from the
assignment of errors which is filed with this petition.

That the said Supreme Court of the state of — is the
highest court of the said state of — in which a decision in
this suit and this matter could be had.

Wherefore, state of — *ex rel.* L. G. petitions and prays
that a writ of error from the Supreme Court of the United
States may issue in this behalf to the Supreme Court of the
state of — for the correction of errors so complained of, and
that a transcript of record, proceedings, and papers in this
cause, duly authenticated, may be sent to the Supreme Court
of the United States.

Dated this — day of —, A. D. —.

R. X.,
Attorney for State of —, *ex rel.* L. G.

(1) This jurisdiction is founded generally on the Judicial Code, Sec. 237, which brought forward the provisions of Act of September 24, 1789, 1 Stat. L. 85, and Act of February 5, 1867, 14 Stat. L. 386; R. S. U. S., Sec. 709. The provisions now in Sec. 237 relating to certiorari have been added by amendment since the adoption of the Judicial Code.

This petition, an assignment of errors and a bond should be filed in the court to which the writ is to issue.

A writ of error can only be maintained when one of the questions mentioned in Judicial Code, Sec. 237, was decided by the court to which the writ is directed. *Capital Bank v. Cadiz Bank*, 172 U. S. 425, 430; *Tinsley v. Anderson*, 171 U. S. 101; *Bartemeyer v. Iowa*, 14 Wall. 26. The result of the authorities is that the federal character of the suit must appear in the plaintiff's own statement of his claims, and that where a defense has been interposed, the reply to which brings out matters of a federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action, but are merely a reply to the defense set up by the defendant. But see *Houston & Tex. Cent. R. Co. v. Texas*, 177 U. S. 78.

A petition for writ of error from the Supreme Court of the United States to the highest court of a state must be presented to and allowed by the chief justice of the state court or by a judge of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor the writ may be allowed by that judge or chancellor or by a justice of the Supreme Court of the United States. It is not sufficient that the writ is allowed by an associate justice of the state court. *Havnor v. New York*, 170 U. S. 408. See also R. S. U. S., Secs. 1003 and 1004.

The application should not be made to the Supreme Court of the United States unless at the request of one of the members of that court concurred in by his associates. *In re Robertson*, 156 U. S. 183.

No. 1838.

Petition for Writ of Error from the Supreme Court to a State Court(1), in a Case Involving Due Process of Law.

The Supreme Court of the State of —
 State of —, ex rel. B. M., Appellant,
 vs.

T. M., as Sheriff of — County, —, Respondent.

To the Honorable M. S., Chief Justice of the Supreme Court of the State of —.

Now comes B. M., the above named relator and appellant, by his attorneys, R. X. and G. X. and complains and alleges that he is a citizen of the United States of America; that in the above-entitled matter, on the — day of —, final judgment was rendered against your petitioner by the Supreme Court of the state of —, that being the highest court of law or equity in the said state of —, wherein it was adjudged that the provisions of chapter 225 of the General Laws of 1899 in and for the state of —, which made it unlawful from and after June, —, for any person, firm, or corporation in said state to engage in the business of selling agricultural products and farm produce on commission, or to receive or solicit consignments thereof for sale on commission in the state of —, without first obtaining a license from the railroad and warehouse commission of said state to conduct and carry on the business of such commission merchant, and giving a bond to the state of —, with sufficient surety, for the benefit of persons entrusting such commission merchant with consignments of agricultural products and farm produce to be sold on commission, are not in conflict with the provisions of section one (1) of the fourteenth amendment to the Federal Constitution, in that the provisions of said act did not deprive certain citizens of the United States and of the state of — of rights, privileges, or immunities secured to other citizens of the United States and of said state, nor of liberty or property without due process of law, nor the equal protection of the law.

It was also adjudged by said Supreme Court, by its said final judgment in the above-entitled matter, that the provisions of said act are not in violation of the provisions of section 8 of Article I. of the Federal Constitution, giving to Congress the exclusive right to regulate commerce among the several states, and that its provisions were not unconstitutional on the ground that legislative powers are delegated to the

railroad and warehouse commission of the state, all of which appears in the record, opinion, and final judgment of said Supreme Court discharging the writ and remanding your petitioner to the custody of the sheriff of said — county, the respondent herein, whereby manifest error has happened to the great damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the state of — and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected and said judgment reversed and your petitioner discharged; and your petitioner will ever pray.

B. M.,

Petitioner.

By R. X.,

G. X.,

His Attorneys.

(1) See note to No. 1837.

No. 1839.

**Petition for Writ of Error from Judgment of State Court(1)
on Ground of Unconstitutionality of State Statute.**

[*Caption.*]

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee:

Your petitioner hereby respectfully sets forth and shows that on the 17th day of April, 1915, the Supreme Court of the State of Tennessee, sitting at Nashville, Tennessee, made and entered a final order and judgment in the above entitled cause in favor of the defendant, and against your petitioner, in which final order and decree and the proceedings had in this cause, certain errors were committed to the prejudice of your petitioner, the Western Oil Refining Company, all of

which appear in detail from the assignment of errors filed in this cause with this petition; and,

That the said Supreme Court of the State of Tennessee is the highest court of said state of Tennessee in which a decision in this suit and matter could be had; and,

That this suit, or cause, is one in which your petitioner sought to recover of H. W. Thomas, county court clerk of Maury county, Tennessee, privilege tax to the amount of thirty-seven and 50/100 (\$37.50) dollars, and costs of a distress warrant issued by said Thomas, clerk as aforesaid, to collect said tax, all of which was paid by petitioner to said Thomas, clerk as aforesaid, under protest, after levy on petitioner's property of a distress warrant issued by said Thomas, clerk as aforesaid, and the same was paid by petitioner in order to prevent a sale of its property so levied on; the said Thomas, clerk as aforesaid, insisting that petitioner was doing business within the state of Tennessee and was liable for a privilege tax to the state of Tennessee under a certain statute of the state of Tennessee, known as chapter 479 of the printed acts of said state for 1909, and particularly Sec. 4 of said Act, and petitioner insisted that it was not liable for said tax in order to carry on the said business for which said tax was demanded and collected as aforesaid; that it was engaged solely in interstate commerce and was protected from the payment of said tax by Sec. 8 of Art. I of the Constitution of the United States, and of Sec. 10 of Art. I of said Constitution, and that if under said act of said state of 1909 petitioner was liable for said tax then that said act or the particular Sec. 4 thereof under which said tax was collected was in violation of said sections of the Constitution of the United States, and, therefore, void.

And a final judgment was rendered therein, as above stated, refusing your petitioner the relief sought in said suit and adjudging that it was liable for said tax and the costs of this cause.

This judgment, your petitioner shows, was erroneous, as shown by, and upon the grounds stated, in the assignment of errors filed herewith.

Wherefore, your petitioner, the Western Oil Refining Company, prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of the State of Tennessee for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

This the 15th day of May, 1915.

A. & B.,

Attorneys for Western Oil Refining Company.

(1) **Jurisdiction of Supreme Court Rests on Judicial Code, Sec. 237.** There is no right in the Supreme Court to review the judgment of a state court except as provided in Judicial Code, Sec. 237, and the provisions are given a strict construction. *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417; *Roller v. Murray*, 234 U. S. 738, 58 L. Ed. 1570.

Where error is prosecuted to the Supreme Court contrary to Judicial Code, Sec. 237, that court will dismiss, although the defendant in error makes no objection to the jurisdiction. *N. P. Ry. v. Solum*, 247 U. S. 477, 481; 62 L. Ed. 1221.

Where a state court sustained a state succession tax on shares of stock covering interests in realty in part outside of the state, and it was objected that this tax was imposed upon or on account of realty outside the state, and hence operated to deprive one of his property without due process of law under the Fourteenth Amendment, held, such decision did not involve the validity of the statute of, or of any authority exercised under, the state on the ground of repugnancy thereof to the federal constitution, laws or treaties, and hence review by error did not lie. *Dana v. Dana*, 250 U. S. 220, 63 L. Ed. 947.

What State Court is Meant. The state court meant in Judicial Code, Sec. 237, is the highest in which a decision could be had; and where error would lie to a higher court, but the latter refuses the writ, the writ from the Supreme Court of the United States should run to the lower court. *Kanawha R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027. See also *Ky. v. Powers*, 201 U. S. 1, 50 L. Ed. 633; *W. U. Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. Ed. 498.

Where the highest court has discretionary power of review and has refused, error lies to the intermediate court; but where the discretion has not been solicited the Supreme Court will dismiss for want of

jurisdiction. *Fisher v. Perkins*, 122 U. S. 522, 30 L. Ed. 1192; *Mullen v. Western Beef Co.*, 173 U. S. 116, 43 L. Ed. 635; *Stratton v. Stratton*, 239 U. S. 55, 60 L. Ed. 142.

Also, where the highest court of the state has decided against its jurisdiction, the writ will run to the intermediate court. *San Antonio R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110.

Where the Supreme Court of Ohio refused a writ of certiorari to the Court of Appeals, and later dismissed a writ of error for want of jurisdiction, the writ from the Supreme Court of the United States will run to the Court of Appeals. *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U. S. 300, 303, 61 L. Ed. 1154; and see *Stratton v. Stratton*, 239 U. S. 55, 60 L. Ed. 142; *Valley Steamship Co. v. Wattawa*, 241 U. S. 642, 60 L. Ed. 1217; *First Natl. Bank v. Second Natl. Bank*, 242 U. S. 600, 61 L. Ed. 518.

Where the Supreme Court of Missouri quashed the judgment of the Missouri Court of Appeals, on a proceeding in certiorari, and remanded the cause to the state Court of Appeals for decision, and accordingly that court rendered a decision under the law of Missouri, the Court of Appeals is the "highest court in which a decision in such suit could be had," in accordance with the provisions of Judicial Code, Sec. 237. *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 64 L. Ed. —.

Review whether Questions Characterized as Federal or Not. Where the judgment of the state court necessarily involved the determination of federal questions, the Supreme Court may review on error, although the plaintiff in error did not below distinctly characterize them as federal questions. *Cissna v. Tennessee*, 246 U. S. 289, 295, 62 L. Ed. 720; *Miedreich v. Lauenstein*, 232 U. S. 236, 243, 58 L. Ed. 584; *N. Ca. Ry. Co. v. Zachary*, 232 U. S. 248, 257, 58 L. Ed. 686; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 49, 59 L. Ed. 1192.

Judgment Not Final where Rehearing Pending. Judgment in state court is not final until petition for rehearing is disposed of. *Chicago & Great W. Ry. Co. v. Basham*, 249 U. S. 164, 63 L. Ed. 534; *Citizens' Bank v. Opperman*, 249 U. S. 448, 63 L. Ed. 701.

Precedence to Reviews Herein. By Judicial Code, Sec. 253, writs of error to the Supreme Court from a state court are given precedence in criminal cases, except over cases to which the United States is a party, and such other cases as the Supreme Court may determine to be of public importance.

Meaning of "Drawn in Question." Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise; and validity of an authority stands upon the same footing. *Balti. & Pot. R. R. Co. v. Hopkins*, 135 U. S. 210, 32 L. Ed. 908; *Miller v. Ry. Co.*, 168 U. S. 131, 42 L. Ed. 409.

The validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitu-

tionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 451, 57 L. Ed. 591; *Foreman v. Meyer*, 227 U. S. 452, 57 L. Ed. 594; *Ireland v. Woods*, 246 U. S. 323, 328, 62 L. Ed. 745.

It has frequently been said that the "title, right, privilege or immunity" must be "specially set up" in the state court. *Ferris v. Frohman*, 223 U. S. 424, 56 L. Ed. 492; *Roller v. Murray*, 234 U. S. 738, 58 L. Ed. 1570; *Olympia Mining Co. v. Kerns*, 236 U. S. 211, 59 L. Ed. 542; *Fox v. Washington*, 236 U. S. 273, 59 L. Ed. 573.

But in cases involving a right under a treaty or federal statute, it has been held sufficient if the federal question appeared in the record and was decided, or if the decision could not have been made without deciding it. *Harris v. Devine*, 3 Pet. 292, 7 L. Ed. 683; *Powell v. Brunswick Co.*, 150 U. S. 433, 37 L. Ed. 1134; *Yazoo R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395.

But in a late case it is said that it is irrelevant to inquire how and when a federal question was raised in a court below, when it appears that such question was considered and decided. *Manhattan L. Ins. Co. v. Cohen*, 234 U. S. 123, 58 L. Ed. 1245.

As to the jurisdiction of the Supreme Court to review questions of fact, it has long been settled that the decision of the state court is conclusive; but where fact and law are so interwoven that the facts must be considered to determine whether the finding of facts involved a conclusion of law, the Supreme Court will examine the entire record for that purpose. *Norfolk Ry. Co. v. Conley*, 236 U. S. 605, 59 L. Ed. 745; *Carlson v. Washington*, 234 U. S. 103, 58 L. Ed. 1237.

Where the alleged federal question is frivolous or without merit because of previous authority, the duty of the Supreme Court to dismiss is again made clear in *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, and *Rankin v. Emigh*, 218 U. S. 27, 54 L. Ed. 915.

Right Claimed under State Law. Where the question of repugnancy of a state statute, etc., to the federal constitution, etc. (Judicial Code, Sec. 237) is first urged in a petition for a rehearing, and said petition is not entertained, the Supreme Court has no jurisdiction under Judicial Code, Sec. 237; likewise if the point raised in this way is not determined upon the hearing on the petition. *Godchaux Co. v. Estopinal*, 251 U. S. 179, 180, 64 L. Ed. —; *Mut. L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480; *St. L. & T. F. R. Co. v. Shepherd*, 240 U. S. 240, 60 L. Ed. 622; *M. P. Ry. Co. v. Taber*, 244 U. S. 200, 61 L. Ed. 1082; *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 258, 64 L. Ed. —.

Whether taxation by a state complained of was for a public use is a question "concerning which local authority, legislative and judicial, has especial means of securing information to enable them to form a judgment; and particularly the judgment of the highest court of a

state declaring a given use to be public in its nature, will be accepted" by the Supreme Court unless clearly unfounded; and the Supreme Court of the United States on error from the Supreme Court of North Dakota failed to find the legislation complained of in contravention of the "due process" provision of the Fourteenth Amendment. *Green v. Frazier*, 252 U. S. —, 64 L. Ed. —.

The Supreme Court still has frequent occasion for reiterating that a decision of the state court which is based on a proposition of state law sufficient to sustain it, is not reviewable, although a federal question was also decided. *Petrie v. Nampa Irrigation District*, 248 U. S. 154, 63 L. Ed. 178; *Farson & Co. v. Bird*, 248 U. S. 268, 63 L. Ed. 233.

As to state legislation involving the impairment of a contract, where a question of its validity is raised in the state court, see *Ennis Waterworks v. Ennis*, 233 U. S. 652, 58 L. Ed. 1139; *N. Y. El. Lines Co. v. Empire City Co.*, 235 U. S. 179, 59 L. Ed. 184; *La. R. Co. v. New Orleans*, 235 U. S. 164, 59 L. Ed. 175; *Texas, etc., Co. v. Miller*, 221 U. S. 408, 55 L. Ed. 789.

Right Claimed under Federal Law and How Shown. Where a suit in a state court necessarily turns on the construction of the charter of defendant corporation, granted by Congress, a federal question is involved, and the Supreme Court of the United States has jurisdiction in error, under Judicial Code, Sec. 237, where the construction denies a right contended for by defendant below, who is plaintiff in error. *Knights of Pythias v. Mims*, 241 U. S. 574, 60 L. Ed. 1179; *Knights of Pythias v. Smith*, 245 U. S. 594, 62 L. Ed. 492.

The Supreme Court must examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived; and where a common carrier, wishing to issue bonds, obtains a certificate therefor from a state public utilities commission and under protest pays the fee demanded, it does not by requesting and accepting the prerequisite certificate waive its right to have a review of the matter on the ground that such fee exaction is an interference with interstate commerce and a violation of the Fourteenth Amendment. It acts under duress and that implies a choice, but the duress deprives the choice of the quality of voluntariness and consequently precludes a claim of waiver. *U. P. Ry. Co. v. Pub. Serv. Com. of Mo.*, 248 U. S. 67, 69, 70; 63 L. Ed. 131.

Whether a state court has correctly followed rules of erosion, etc., applicable to interstate boundary streams so as to give proper effect to treaties and acts of Congress establishing a river as an interstate boundary, is a federal question. *Cissna v. Tennessee*, 246 U. S. 289, 62 L. Ed. 720.

The certificate of the chief justice of the state court as to the questions raised and passed upon is not of itself sufficient to show the federal question; its function is to make certain that which in the

record is indefinite and uncertain. *Fullerton v. Texas*, 196 U. S. 192, 49 L. Ed. 443; *Rector v. City Bank*, 200 U. S. 405, 50 L. Ed. 527.

As to questions involving the "full faith and credit" clause of the federal constitution, see *Supreme Council v. Green*, 237 U. S. 531, 59 L. Ed. 1089; *Mut. L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. Ed. 480; *West Side R. Co. v. Pitts. Constr. Co.*, 219 U. S. 93, 55 L. Ed. 107.

Special Federal Statutes Involved. For a group of cases involving power to review by error proceedings where the Federal Employers' Liability Act is involved, see *Great N. Ry. Co. v. Alexander*, 246 U. S. 276, 62 L. Ed. 713; *L. & N. Ry. Co. v. Holloway*, 246 U. S. 525, 62 L. Ed. 867; *G. W. Ry. Co. v. Donaldson*, 246 U. S. 121, 62 L. Ed. 616; *Dickinson v. Stiles*, 246 U. S. 631, 62 L. Ed. 908; *Toledo R. Co. v. Slavin*, 236 U. S. 545, 59 L. Ed. 671; *Chicago R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140; *Seaboard, etc., R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062.

Involving the Carmack Amendment, see *Cleveland, etc., R. Co.*, 239 U. S. 588, 60 L. Ed. 453.

Involving the Safety Appliance Act, see *Minneapolis R. Co. v. Popplar*, 237 U. S. 369, 59 L. Ed. 1000; *St. L. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061.

Practice in State Court where Federal Question Involved. If the federal question is raised in the state court in accordance with the state practice, and is passed upon by the state court as required, the Supreme Court has jurisdiction. *North Car. R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591; *Louisville & N. R. Co. v. Woodford*, 234 U. S. 46, 58 L. Ed. 1202; *Miedreich v. Lauenstein*, 232 U. S. 235, 58 L. Ed. 584.

Whether the Supreme Court may review the decision of a state court where denial of "due process" is alleged as constituting the federal question, is considered in *McDonald v. Oregon R. & Nav. Co.*, 233 U. S. 665, 58 L. Ed. 1145, where it is said: "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character."

Various phases of this question have been many times considered. *Keerl v. Montana*, 213 U. S. 135, 53 L. Ed. 734; *Bowe v. Scott*, 233 U. S. 658, 58 L. Ed. 1141; *King v. W. Va.*, 216 U. S. 92, 54 L. Ed. 396; *Barrington v. Missouri*, 205 U. S. 483, 51 L. Ed. 890.

The federal question must appear in the record below in time under the state practice to be decided by the court whose judgment is under review. *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. Ed. 480; *Louisville, etc., R. Co. v. Higdon*, 234 U. S. 592, 58 L. Ed. 1484; *Grannis v. Ordeau*, 234 U. S. 385, 58 L. Ed. 1363; *Moliter v. Wabash Ry. Co.*, 180 Mo. App. 84.

The federal question may even appear for the first time in a petition for rehearing in the state court if that court decided the question on the rehearing. *Consol. Turnpike Co. v. Norfolk Ry. Co.*, 228 U. S. 326, 57 L. Ed. 857; *Atchison R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050. But not if the question thus raised was not passed upon. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 53 L. Ed. 431; *St. L., etc., R. Co. v. Shepherd*, 240 U. S. 240, 60 L. Ed. 622.

Of course, if the question is for the first time introduced into the petition for the writ of error, it is too late. *Johnson v. N. Y. L. Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273; *Rogers v. Clark Iron Co.*, 217 U. S. 589, 54 L. Ed. 895. Although it is also put into the assignment of errors. *Montana v. Rice*, 204 U. S. 291, 51 L. Ed. 490; *Hulbert v. Chicago*, 202 U. S. 275, 50 L. Ed. 1026.

Opinion of State Court Regarded by Supreme Court. The opinion of the state court may be looked to to ascertain whether the federal question was decided below, inasmuch as the rule of the Supreme Court requires the opinion to be sent up with the record. *San Jose Land Co. v. San Jose Ranch Co.*, 189 U. S. 180, 47 L. Ed. 768; *Malinckrodt Chemical Works v. Missouri*, 238 U. S. 41, 59 L. Ed. 1192.

Where the opinion does not refer to the federal question, it is sufficient if the record shows it was raised. *International Harvester Co. v. Mo.*, 234 U. S. 199, 58 L. Ed. 1276.

No. 1840.

Application for Writ of Error to United States Supreme Court in Suit Under State Workmen's Compensation Law.

[Caption.]

To the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals:

The petition of Southern Pacific Company respectfully shows:

On August 15, 1914, Christen Jensen received injuries which resulted in his death, and thereafter a claim for compensation under the Workmen's Compensation Law was filed with the New York State Workmen's Compensation Commission by Jensen's widow, defendant in error. Jensen was injured while in the employ of your petitioner, a Kentucky corporation. At the time of the accident Jensen was driving an electric truck. In driving the truck through a port in the side of the vessel his head struck your petitioner's vessel *El Oriente*, then lying in the Hudson river. Jensen

was engaged in unloading cargo from said vessel, which cargo had been brought to the state of New York from other states. Your petitioner was a common carrier by railroad. Your petitioner's business in this state consists solely in carrying passengers and merchandise between New York and other states, and Jensen's work consisted solely in moving cargo destined to or from other states.

Your petitioner objected to the making of an award on various grounds set out in the record and set out in the assignments of error made in connection with this application for a writ of error. The commission, however, on October 9, 1914, made an award of compensation claiming to act under the Workmen's Compensation Law of the state of New York, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41.

From said award your petitioner appealed to the Appellate Division of the Supreme Court, Third Judicial Department, and said Appellate Division affirmed said award. Thereupon your petitioner appealed from said order to the New York Court of Appeals, which is the highest court in the state of New York, and said Court of Appeals adjudged that said order of said Appellate Division should be affirmed and it remitted the record with its said judgment to the said Appellate Division, which thereupon made said judgment of the Court of Appeals the judgment of said Appellate Division. Said record is now with said Appellate Division.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, your petitioner prays for the allowance of a writ of error, returnable to the Supreme Court of the United States, and a citation.(1)

And so it will ever pray, etc.

SOUTHERN PACIFIC COMPANY,

By A. B. & C. D.,

Its Attorneys.

(1) Conflict between State Workmen's Compensation Statutes and Admiralty Law governing the contract of a seaman injured in the course of his employment.

The difficulty arises over the proper construction of the provision of Art. III, Sec. 2, of the United States Constitution, conferring admiralty and maritime jurisdiction upon the federal courts, and the statutes enacted in pursuance thereof, Judicial Code, Secs. 24 and 256, in both of which is found the proviso "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," and conferring such exclusive original jurisdiction upon the District Court. The question has been raised in cases where an injured seaman has been awarded compensation under state compensation laws. Possibly the earliest case is *Schuede v. Zenith S. S. Co.*, 216 Fed. 566, N. D., Ohio, E. D., June 3, 1914.

The injury occurred under circumstances found by the court to constitute a maritime tort, in the harbor at Cleveland, Ohio; the injured seaman sued under the Ohio Employer's Liability Act in the state court, and the defendant, a Minnesota corporation, removed to the United States District Court.

In its answer defendant alleged the employment in which the injury occurred was under a maritime contract and that the right of recovery was determinable by the incidents of such a contract.

Plaintiff moved to strike out these allegations and the issue arose upon this motion. The court reasoned that Sec. 2 of Art. III of the constitution practically adopted the general law of admiralty as the law of this country, and that rights in admiralty can not be affected by state statute. The "saving" provision of the Judiciary Act of 1789, and now in Judicial Code, Secs. 24 and 256, leaves often the common-law jurisdiction of the state courts over torts committed at sea and nothing else; and the "extent of liability for such a tort to be enforced in a common-law jurisdiction is to be restrained by the law which created the relation in which it was committed" (p. 568). Further, if the suitor go into a state court he gets only the right to employ the practice, procedure and rules of evidence there prevailing; but these do not work a change in the character and measure of his demands nor in the responsibilities and defenses of the employer defendant. Hence even the state court must enforce the general and uniform maritime law under which the contract of employment was made.

The Ohio statute abolished in such cases the doctrines of fellow servant and contributory negligence, but these inhere in a maritime employment, and hence can not be inhibited to the employer as defenses, by a state statute.

Hence, the court held that the Ohio Employer's Liability Act, the so-called "Morris Act," is inapplicable to a maritime contract of employment and accordingly overruled the motion to strike from the answer.

This case was carried to the Supreme Court on certificate from and certiorari to the Circuit Court of Appeals, and in 244 U. S., p. 646, in a per curiam opinion, the court divided equally, and hence the judgment of the District Court was affirmed.

A little later the case of *Jensen v. Southern Pacific Co.*, came on in New York; the Workmen's Compensation Commission of New York, acting under the statute of that state made an award to the widow and children of one Jensen who was killed while in a maritime employment. The employing company contested the award, and among other defenses set up that the act was in violation of the constitutional provision conferring admiralty and maritime jurisdiction upon the federal courts, and hence in contravention of Judicial Code, Secs. 24 and 256.

The court found the remedy given by the Compensation Act to be of a "character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and not saved to suitors from the grant of exclusive jurisdiction to the federal courts in admiralty and maritime matters; further if the states may subject foreign ships coming into their ports to such obligations as are imposed by the Compensation Act, then uniformity in maritime matters, adapted to be secured by the constitution, is destroyed.

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction" (p. 217). Citing *Atlantic Transport Co. v. Imbroke*, 234 U. S. 52, 59, 60.

In this case also four justices dissented, J.J. Holmes and Pitney rendering comprehensive dissenting opinions. (Probably the same four held the same view in the *Schuede* case, but inasmuch as Justice Day took no part in that case there could be no affirmative conclusion.)

Following these cases, Congress, by Act of October 6, 1917, 40 Stat. L. 397, amended the Judicial Code, Sec. 24, cl. 3, and Sec. 256, cl. 3, by adding at the end of the "saving" clause the words "and to claimants the rights and remedies under the Workmen's Compensation law of any state," and straightway the question arises whether the scope of the maritime jurisdiction impressed in the *Jensen* and *Schuede* cases was by this act invaded.

Two cases have come up to the Supreme Court involving this act: (1) *Peters v. Veasey*, 251 U. S. 121, where the injury was caused before the passage of the act and the act was held not to be retroactive, therefore the case was controlled by the *Jensen* and *Schuede* cases; (2) *Knickerbocker Ice Co. v. Stewart*, 252 U. S. —, 64 L. Ed. — (advance opinions, No. 15, June 15, 1920, p. 526), in which the act was declared contrary to the constitution, Art. III, Sec. 2, because: the act sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for

injuries suffered by employees engaged in maritime work. The definite object of the constitutional grant was to commit direct control to the federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the union.

Such rules may not be repealed, amended or changed except by congressional legislation, and this function is non-delegable. Congress can not authorize the states to make such enactments, for to do so would defeat the very purpose of lodging the power in Congress, namely, uniformity and harmony.

The best statement of the reasons for the opposite conclusion is made by Justice Pitney in his dissenting opinion in the Jensen case; Justice Holmes also dissents ably in the Jensen case and in the Knickerbocker Ice Co. case; while Judge Wolverton makes a careful estimate of the authorities in *Keithley v. N. P. S. S. Co.*, 232 Fed. 255, in which he states inability to agree with the conclusion reached in the Schuede case.

But the law is now clearly settled in these features, viz.:

(a) A State Workmen's Compensation Law could not provide a remedy different from that of admiralty in a case where a maritime employe is injured in the employment, under the saving clause of Judicial Code, Secs. 24 and 256, as they stood prior to 1917. The Jensen case, above, and the Peters case, above.

(b) The addition to the saving clause of those sections of the remedies of claimants under the Workmen's Compensation Laws is unconstitutional, and hence the remedies of admiralty are still exclusive. The Knickerbocker Ice Co. case, above.

(c) The last case points the way only through positive congressional legislation and not through acts sanctioning or adopting state laws.

No. 1841.

Petition for and Allowance of Writ of Error from the Supreme Court to a State Court(1), Where Denial of a Right Claimed Under Federal Statutes.

The Supreme Court of the State of —.

A. B.

vs.

C. D. R. Co.

To the Honorable J. S., chief justice of the Supreme Court of the state of —.

The petition of the C. D. Railroad Company respectfully shows: That heretofore, to-wit, upon the — day of —, —, there was tried in the city court of —, in the county

of —, of the state of —, a case in which A. B. was plaintiff and your petitioner was defendant.

The declaration of the plaintiff in said case was a petition for the recovery of damages by reason of the homicide of the plaintiff's son, said damages being laid in the sum of — (\$—) dollars, and the said homicide being alleged by plaintiff to have been the result of an assault by the employees and servants of your petitioner upon said plaintiff's minor son, and in the course of which assault plaintiff's said son was thrown by your petitioner's employees and servants to the ground from a rapidly moving railroad train and thereby instantly killed.

Upon the trial of said case in said city court, your petitioner demurred, both generally and specially, to plaintiff's said declaration and to the amendment filed thereto by her, upon the following grounds, namely:

First. Because the injuries alleged to have been sustained by plaintiff do not appear to have been caused by defendant or by any person or persons acting within the scope of its business or within the duty of such person or persons or by the command or permission of defendant.

Second. Because it does not appear that the relation of passenger and carrier then and there existed between plaintiff and defendant.

Third. Because said plaintiff, as appears from his petition, was then and there engaged in the execution of an illegal and fraudulent agreement or understanding between himself, his associate, and some other person in violation of the rules of said defendant, and for the purpose of cheating and defrauding it of its revenues.

Fourth. Because it does not appear that the train referred to in said petition was a freight train and not a passenger train, and it is not alleged that the same carried or was accustomed or authorized to carry passengers.

Fifth. Because it appears by paragraph 14 of said petition that at the May term, —, of this court plaintiff filed his suit

for the same cause of action alleged in the pending suit, and that said suit was afterwards removed from said court to the District Court of the United States for the — division of the — district of —, and there, upon the — day of —, the same being a day during the November term of said District Court, and after the evidence in favor of said plaintiff in said case had been fully heard, said case was dismissed in said court and discontinued, and the same, upon the — day of —, renewed by the bringing of the suit pending in this court, without the plaintiff having alleged that she had first paid, before the renewal of said case, the costs which had accrued and become payable by law in said first and dismissed cause, and said accrued costs not having been paid in said cause before the institution of this suit, the same ought by law to be dismissed, and can not be maintained in this court.

Sixth. Because, as appears by paragraph 14 of plaintiff's petition, said plaintiff at the May term, —, of this court instituted his suit against this defendant upon the same cause of action against this defendant, which suit was subsequently removed to the District Court of the United States for the — division of the — district of —, and said suit so brought and removed was by said District Court on the — day of —, the same being a day of the November term, —, of said court, and after the evidence therein in favor of said plaintiff had been fully heard, discontinued and dismissed from said District Court, and, the same being true, the said plaintiff is not entitled or authorized by law to institute and maintain the pending suit in this court, and this court is without power, jurisdiction, or authority of law to entertain and determine the said pending suit.

Seventh. Because said plaintiff having brought said case so dismissed, as in paragraph 14 of said petition stated, and for the recovery of the sum in said first suit stated and sued for, to-wit, ten thousand dollars, as appears by said petition of file and record in this court, the sum claimed became thereby fixed, and the bringing of said second suit in renewal of the

first and fixing and stating the damage or sum claimed at \$1,999.00 instead of \$10,000.00 is a manifest effort to defeat and deprive the District Court of the United States of jurisdiction in and of said case, and is contrary to and an attempted evasion of law, and is against public policy and the spirit and intention of the law and not to be permitted by this court.

Which said demurrer was sustained by said court; and thereupon there was a judgment in said case by said court in favor of your petitioner and against said plaintiff and dismissing plaintiff's said action; whereupon said plaintiff took a bill of exceptions to the Supreme Court of the state of —, that being the highest court of law or equity of the said state in which a decision could be had in said case, assigning therein as error the sustaining of said demurrer in said case by said city court of — and the judgment of said court dismissing said case and in favor of your petitioner.

The 5th, 6th, and 7th grounds of said demurrer are herebefore copied and set out *in extenso*, and your petitioner shows that each of said grounds raised and presented a Federal question in said case, namely:

First. Whether the removal of a case to the Federal from the state court and the entering in the Federal court upon the trial of the case there of a judgment of nonsuit or the allowance under the circumstances in this particular case of a voluntary dismissal or discontinuance prevents the bringing of another suit upon the same cause of action by the same plaintiff in the state court; and,

Second. Whether, if the case is originally brought in a state court and thence removed by the defendant to a Federal court, and, at the close of a trial upon its merits in the latter court, plaintiff, voluntarily and to avoid the direction by the court of an adverse verdict, discontinues or dismisses her case, plaintiff can subsequently renew or reinstitute her case in a state court upon the same cause of action and against the same defendant for the recovery as damages of a sum less

than the jurisdictional amount, namely, two thousand dollars, required in order to authorize the courts of the United States to have jurisdiction of the case, and thus deprive the defendant of the right to again remove the case thus rebrought and the courts of the United States of all jurisdiction of that cause of action and case; and,

Third. Whether if such renewal is had it must be made in the United States courts and not in those of the state, under the laws of the United States, and,

Fourth. When a United States court has once properly obtained jurisdiction of such a case, is it not bound to and does it not, under the laws of the United States, retain and continue that jurisdiction of that cause of action until the final determination of that entire controversy?

And your petitioner alleged and contended by said demurrer and in said case that the bringing of said case in said city court of —, after the same had been dismissed in the District Court of the United States for the — division of the — district of —, was repugnant to and in violation of the laws of the United States, and especially of those acts of the Congress of the United States commonly called the "removal acts."

At the October term, —, of the Supreme Court of the state of — the complaint made by said bill of exceptions and its accompanying record came on to be heard and was argued in said Supreme Court and on the — day of —, A. D. —, the said Supreme Court rendered its final judgment thereon, reversing the judgment of the court below, namely, the city court of — aforesaid.

Petitioner further shows that the said judgment of said Supreme Court was and is a final judgment in the highest court of the state of — in which a decision in said suit could or can be had.

Petitioner further shows that a Federal question was made in said case, to wit, as hereinbefore set out, and that said

judgment of said Supreme Court was repugnant to and in conflict with the laws, of the United States and the "removal acts" of its Congress aforesaid, and that said judgment of said Supreme Court was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of — in said case and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate—a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of —, be reversed.

The C. D. Railroad Company.

By its attorneys in law and in fact.

B. W.

C. & W.

J. H.

Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this — day of —, A. D., —, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of \$—. Dated at — this — day of —, A. D. —.

T. S.

Chief Justice, Supreme Court of the State of —.

Filed in my office this — day of —, A. D., —.

Z. D.

Clerk Supreme Court of the State of —.

No. 1842.**Order Allowing Writ of Error from the Supreme Court to a
State Court (1).**

The Supreme Court of the State of —.

A. B., Appellant,

vs.

C. D., Respondent.

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the state of —, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

W. S.

Chief Justice of the Supreme Court of the State of —.

(1) A petition for writ of error from the Supreme Court of the United States to the highest court of a state must be allowed by the chief justice of the state court or by a justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States. It is not sufficient that the writ is allowed by an associate justice of the state court. *Havnor vs. New York*, 170 U. S. 408.

No. 1843.**Writ of Error from State Court to Supreme Court Where
State Statute is Involved.**

United States of America:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Appellate Division, Third Department, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court, Appellate Division, on a remittitur from the Court of Appeals of the state of New York, before you, or some of you, being the highest court of law or equity of the said state in which decision could be had in the said suit between Marie Jensen, plaintiff, and Southern Pacific Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the constitution of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said Constitution, statute, treaty or commission; a manifest error had happened to the great damage of the said defendant, as is said and appears by its complaint. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 16th day of October, in the year of our Lord one thousand nine hundred and fifteen.

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court,
Southern District of New York.

The above writ is allowed by—

WILLARD BARTLETT,

Chief Judge of the New York Court of Appeals.

No. 1844.

**Writ of Error from the Supreme Court of the United States
to State Court.(1)**

The United States of America, ss.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of —, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the state of —, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between A. B. and C. D., wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a

statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said C. D., as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of —, 1894, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice
[Seal.] of the said Supreme Court, the — day of
—, in the year of our Lord —.

J. McK.,

Clerk of the Supreme Court of the
United States.

Allowed by
HORACE GRAY,
Justice.

(1) A writ of error may be allowed by a justice of the Supreme Court of the United States or by the chief justice or judge or chancellor rendering the judgment or passing upon the decree complained of. *Havnor v. New York*, 170 U. S. 408; *Bartemeyer v. Iowa*, 14 Wall. 26. It is not a matter of right. *Ex parte Spies*, 123 U. S. 143.

A writ of error is the proper method to remove a case from the highest court of a state to the Supreme Court of the United States for the purpose of reviewing a judgment or a decree, at law or in equity. No appeal is permitted. Judicial Code, Sec. 237. *Dower v. Richards*, 151 U. S. 666.

A writ of error may be issued by the clerk of the Supreme Court of the United States or by a clerk of the District Court of the United States for the proper circuit, but not by the clerk of the state court. R. S., Sec. 1004; *Ex Parte Ralston*, 119 U. S. 613.

The time within which review by error, appeal or certiorari may be had in the Supreme Court is fixed at three months in all cases by the Act of September 6, 1916, 39 Stat. L. p. 727, chap. 448, Sec. 6.

There can be no doubt about the comprehensiveness of the language of the act, and cases have been dismissed because of failure to apply for the review in time. *Rust Land, etc., Co. v. Jackson*, 250 U. S. 76, from Supreme Court of Mississippi on certiorari; *Kentucky Heating Co. v. City of Louisville*, 250 U. S. 653, from Court of Appeals of Kentucky on error; *Crescent Milling Co. v. Strait Mfg. Co.*, 249 U. S. 585, from United States District Court on appeal, and two other cases between the same parties at 249 U. S., p. 586.

Writ of Error and Certiorari Both May Now be Resorted to in Appropriate Cases for the Purpose of Reviewing the Judgment or Decree of a State Court. Under Judicial Code, Sec. 237, as amended September 6, 1916, 39 Stat. L. 726, the jurisdiction of the Supreme Court to review on error attaches only in two cases, namely: (a) where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question and the decision in the state court was against the validity, and (b) where the validity of a statute of, or an authority exercised under, a state, was drawn in question, on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision in the state court was in favor of the validity. *Ireland v. Woods*, 246 U. S. 323, 327, 62 L. Ed. 745; *Stadelman v. Miner*, 246 U. S. 544, 62 L. Ed. 875; *Citizens Bank v. Opperman*, 249 U. S. 448, 63 L. Ed. 701.

As adopted in 1911, Sec. 237 did not provide for certiorari, and followed the Acts of 1789 and 1867. By Act of December 23, 1914, 38 Stat. L. 790, the clause providing for certiorari was added; by Act of September 6, 1916, 39 Stat. L. 726, the entire section was reenacted

as an amendment, omitting however the following provision in the first paragraph: "Or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority," and inserts in the second paragraph in the place of the last two lines beginning with "or in favor" the following: "Or where any title, right, privilege or immunity is claimed under the constitution or any statute or treaty of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority."

The effect of the amendments is to diminish the error jurisdiction and make optional with the Supreme Court the assumption of jurisdiction over rights and immunities, etc., specially claimed and over decisions upholding the federal view of constitutional issues.

The remedy by certiorari under Judicial Code, Sec. 237, is confined to final judgments, and finality, as in the case where writ of error lies, is determined by the face of the record and the formal character of the judgment rendered by the state court. A judgment of a state court upholding a claimed right to share in a fund accruing under the State Employer's Liability Act, but directing a new trial to ascertain the amount of the share, is not final in the contemplation of said Sec. 237. *Bruce, Admr. v. Tobin*, 245 U. S. 18, 62 L. Ed. 123, *Chi. Gr. W. R. Co. v. Basham*, 249 U. S. 164, 63 L. Ed. 534.

Certiorari under Judicial Code, Sec. 237, and not writ of error, is the proper remedy where, in the state court, the question involved is the validity of the service and the power of the court, in view of Sec. 1 of the Fourteenth Amendment. *P. & R. Coal & Iron Co. v. Gilbert*, 245 U. S. 162, 62 L. Ed. 221.

"The difference between the two modes of review, by error and upon certiorari, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused in the exercise of a sound discretion." *P. & R. C. & I. Co. v. Gilbert*, 245 U. S. 162, 165, 62 L. Ed. 221; *Ireland v. Woods*, 246 U. S. 323, 328, 62 L. Ed. 745.

Where, in the state court, merely a right is claimed under a treaty, depending upon the construction thereof, and the validity of the treaty is not assailed, review in the Supreme Court can be had only upon certiorari, under Judicial Code, Sec. 237, as amended September 6, 1916. *Erie R. R. Co. v. Hamilton*, 248 U. S. 369, 371, 63 L. Ed. 307.

Denial by a state court of rights claimed under the Federal Employer's Liability Act affords no ground for review by error, but only by certiorari, under Judicial Code, Sec. 237.

The words "or otherwise" used in the amendment of September 6, 1916, 39 Stat. L. 726, add nothing of substance to the thought expressed by the amendment. *Chi. Gr. W. R. Co. v. Basham*, 249 U. S. 164, 165, 63 L. Ed. 534.

Certiorari is the proper means of reviewing a judgment of a state court affirming an award against a railroad company under a Workmen's Compensation Law, where the federal question upon which the applicability, as distinct from the validity, of that law depends, is whether the injured employe was engaged in interstate commerce. *So. Pac. Co. v. Ind. Acc. Comn. of California*, 251 U. S. 259, 262, 64 L. Ed. —.

Where the state court upheld a statute that was invalid as construed on the ground that it contravened the "full faith and credit" clause of the constitution, review could be had in the Supreme Court by error, not by certiorari. *Kenney v. Supreme Lodge*, 252 U. S. 411, 64 L. Ed. —.

Where non-federal grounds of decision without fair or substantial support were made the basis of the judgment of the state court, and in that manner claimant lost the benefit of a federal right set up in the suit, the Supreme Court will, on review, inquire whether the right was denied, not alone in express terms, but in substance and effect, and if so will reverse. And accordingly where a county by coercive measures collects a tax on lands which by federal law are exempt, it is no answer to the charge of infringement of a federal right that the court has no statutory power to repay the taxes. Review may be had by certiorari. *Ward v. Board of Comrs.*, 253 U. S. —, 64 L. Ed. —.

No. 1845.

Bond on Writ of Error from Supreme Court to State Court.(1)

Know all men by these presents that we, B. M., as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto A. B. and to P. T., in the sum of one thousand (\$1,000) dollars, to be paid to the said obligees, their successors, representatives, and as-

signs; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of —, A. D. —.

Whereas the above-named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the state of —.

Now, therefore, the condition of this obligation is such that is the above-named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

B. M.

Fidelity and Deposit Company of Maryland,

By Clarence Brown,

[Seal.] A Member of the Local Board of Directors of —.

Attest: W. P., Agent.

Signed, sealed, and delivered in presence of—

P. W.

T. W.

State of —, }
County of —, } ss.

On this — day of —, before me, personally appeared B. M., to me known to be the person described in and who executed the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[Seal.]

W. S.

Notary Public, — Co., —.

State of —, }
County of —, } ss:

On this — day of —, A. D. —, personally appeared before me C. Brown, who, being duly sworn, deposes and

says that he is a member of the local board of directors for — of the Fidelity and Deposit Company of Maryland; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said C. Brown acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal.]

W. S.,

Notary Public, — County, —.

I hereby approve the foregoing bond and sureties this — day of —.

M. S.,

Chief Justice of Supreme Court of the State of —.

(1) The bond on writ of error removing a case from a state court to the Supreme Court of the United States may be allowed by any justice of the Supreme Court or by any chief justice or judge or chancellor of the state court rendering the judgment or passing upon the decree complained of. R. S., Sec. 1000.

As to form of bond and its effect as a supersedeas see note to No. 1797.

Security need not be approved by the same judge who allows the writ of error. *Brown v. N. W. Mut. Life Ins. Co.*, 119 Fed. 148, 55 C. C. A. 654.

The requirement that the judge signing the citation take security, and exception thereto, are laid down in R. S. U. S., Sec. 1000.

This section does not apply to a case of conviction of crime punishable by death. *Amer. Surety Co. v. U. S.*, 239 Fed. 680, 152 C. C. A. 514.

That the federal government is excused from giving security in error or on appeal, as well as in other cases, see R. S. U. S., Sec. 1001.

No. 1846.

Citation to Defendant in Error in Case Removed to the Supreme Court from a State Court.(1)

United States of America, ss.

To Commissioners of Public Lands and O. D., as State Treasurer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within

thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of —, wherein state of, ex rel. L. G. is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this — day of —, in the year of our Lord one thousand nine hundred and —.

Henry B. Brown,
Associate Justice of the Supreme Court of the United States.

[*Service accepted.*]

Copy of the within citation received this — day of —,
A. D. —, at the office of the attorney general of the state
of —.

E. R.,

Attorney General.

By C. E.,

Assistant Attorney General.

(1) A citation is essential to a writ of error. R. S. sec. 999. Notice of a writ of error given in open court at the same term the judgment is rendered is not the equivalent of the citation. In this respect writs of error differ from appeals taken in open court. U. S. *vs.* Phillips, 121 U. S. 254.

The citation should be addressed to the defendant in error and signed by the justice of the Supreme Court of the United States, or by the chief justice or judge or chancellor of the state court rendering the judgment or passing upon the decree complained of. R. S. sec. 999.

The citation should be served and returned as in other cases to the Supreme Court before the return day, which should be within thirty days from the date of signing it. Supreme Court Rule 8, par. 5, which provides for exceptions.

No. 1847.

Assignment of Errors on Writ of Error from Supreme Court
of the United States to a State Court(1), Where State
Statute Alleged to be in Violation of Con-
stitution of the United States.

The Supreme Court of the state of ——.
State of ——, *ex rel.* B. M., Plaintiff in Error.

vs.

T. M., as Sheriff of —— County, ——, Defendant
in Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the state of ——, in the above-entitled matter there is manifest error in this, to wit:

First. The court erred in holding that the provisions of chapter 225, of the General Laws of the state of —— for the year ——, are not in conflict with and in violation of the provisions of the 14th amendment of the Constitution of the United States, for that the state of ——, by and through the provisions of said chapter 225, assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the state of —— of rights, privileges, and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the state of ——, the equal protection of the law.

Second. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of rights, privileges, and immunities secured to other citizens of the United States and of the state of —— by the Federal Constitution and laws of the United States.

Third. The court erred in holding that by the provisions of said act the plaintiff in error is not deprived of liberty and property without due process of law.

Fourth. The court erred in holding that the provisions of said act do not deny to the plaintiff in error the equal protection of the law.

Fifth. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder is within the police powers of the legislature of the state of Minnesota.

Sixth. The court erred in holding the provisions of said act making it unlawful for the plaintiff in error to carry on his business as a grain commission merchant without first taking out a license from the state and giving a bond to the state to be within the police powers of the state.

Seventh. The court erred in holding the provisions of said act requiring plaintiff to take out a license and to give bond not to be an abridgment of the inalienable and constitutional right of plaintiff in error to pursue a lawful avocation in a lawful way without interference by the state.

Eighth. The court erred in holding that the provisions of said act do not unlawfully discriminate between those engaged in selling agricultural products and farm produce on commission and those engaged in selling other personal property on commission.

Ninth. The court erred in holding that the provisions of said act do not cast special burdens upon those engaged in selling agricultural products and farm produce on commission from which other commission merchants are exempt.

Tenth. The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to the plaintiff in error and to other citizens of the state.

Eleventh. The court erred in holding that the provisions of said act are uniform in their operation throughout the state upon all citizens of the state similarly situated.

Twelfth. The court erred in holding that the provisions of said act do not deprive the plaintiff in error of the right to

earn a livelihood in the pursuit of a lawful and harmless occupation and of the liberty of contract in reference to said business.

Thirteenth. The court erred in holding that the provisions of said chapter 225 are not in violation of section 8, Article I., of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

Fourteenth. The court erred in holding that said chapter 225 does not confer on the railroad and warehouse commission legislative power, in that it confers on them the power to arbitrarily fix the amount of all bonds taken under the act and to designate the number and qualifications of sureties.

Fifteenth. The court erred in ordering judgment to be entered discharging the writ of *habeas corpus*.

Sixteenth. The court erred in ordering judgment to be entered and in entering judgment remanding the plaintiff in error to the custody of the defendant in error.

R. X.

G. X.

Attorneys for Plaintiff in Error.

(1) The assignment of errors should be entitled in the Supreme Court of the state and should be filed in that court with the petition for writ of error and the writ of error when it is allowed and issued.

The assignment of errors should set out separately and particularly each error asserted and intended to be urged and should show that the errors complained of were within the purview of Judicial Code, Sec. 237.

No. 1848.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to a State Court(1), Where Right Specially Set Up and Claimed Under Act of Congress was Denied by the State.

The Supreme Court of the State of ———,
State of ———, *ex rel.* L. G.,
vs.

Commissioners of Public Lands and O. D., as State
Treasurer.

State of ——— *ex rel.*, L. G., in connection with the petition for a writ or error herein, makes the following assignment of errors which state of ——— *er rel.* L. G. avers occurred in the final order and judgment herein, dated the ——— day of ———, A. D. ———, as follows, to wit:

First. The Supreme Court of the state of ———, erred in holding that chapter 367 of the Laws of ——— of ——— was a special law regulating the sale of state swamp lands within the territory mentioned therein, and that such chapter is now in force.

Second. The Supreme Court of the state of ———, erred in holding that the application of the relator for leave to purchase such swamp lands under section 205, ——— Statutes of ———, was properly rejected. Section 205 of the ——— Statutes of ———, to the effect that "the minimum price of all the swamp lands is fixed as follows," has but one possible signification; nor is there any other meaning to the words in subdivision 5 of that section, "of all other such lands now owned, or that may hereafter be acquired by the state, one dollar and twenty-five cents per acre."

Third. The order of the Supreme Court of the state of ——— granting the motion to quash the alternative writ of mandamus, and that the proceedings be dismissed with costs against the relator, to be taxed according to law, denied the right to purchase lands granted to the state of ——— under act

of Congress approved September 28, 1850; under act of Congress approved March 2, 1855, and under act of Congress approved March 3, 1857.

Fourth. The interpretation placed upon chapter 367, Laws of of —, by the Supreme Court of the state of — is contrary to, in violation of, and in contravention of the said statutes of the United States as to the disposal of the proceeds of the swamp lands, and is contrary to the laws and Constitution of the United States.

Fifth. Chapter 367 of the Laws of — of — attempted to supersede section 205 of the Revised Statutes of 1878, as to these lands, for the purpose of diverting the proceeds of the sales thereof into the general fund of the state of Wisconsin, in violation of the provisions of the acts of Congress relating to swamp land grants.

Sixth. The interpretation placed upon said chapter 367 of the Laws of — of — by the Supreme Court of the state of — diverts the proceeds of the sales of swamp lands from the purposes provided for by the act of Congress approved September 28, 1850, and such chapter 367 is therefore void.

The Supreme Court of the state of —, which is the highest court of said state in which a decision in this suit could be had, where was drawn in question the validity of said chapter 367 of the Laws of — of 1897, on the ground that said law was in violation of the act of Congress as to swamp land grants, rendered judgment against the right specially set up and claimed by state of — *ex rel.* L. G. under said acts of Congress.

State of — *ex rel.* L. G. prays that a writ of error from the Supreme Court of the United States may issue to the Supreme Court of the state of —; and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Supreme Court of the state of —, and that the State of — *ex rel.* L. G. may be restored to all things which state of — *ex rel.* L. G. has lost

by occasion of the said final order and judgment; and, further, may have such other and further relief as may be proper and just.

Dated this — day of —, A. D. —.

R. X.

Attorney for State of — *ex rel.* L. G.

(1) See note to Form No. 1847.

No. 1849.

**Assignment of Errors on Writ of Error from Supreme Court
to a State Court(1), Where Right Asserted Under
State Law is Alleged to be in Violation of
Federal Law.**

The Supreme Court of the State of —.

Florida Railroad Company, Plaintiff in Error,

vs.

C. D., Defendant in Error,

And now, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, comes the Florida Railroad Company, plaintiff in error, by its counsel, in the above-stated case, and says — assigning error therein, says: that in the record and proceeding in the aforesaid cause there is manifest error in this, to wit:

That the Supreme Court of the state of — erred in adjudging and deciding that “through the plaintiff in a suit which had been properly removed from a state to a Federal court having concurrent jurisdiction of the cause of action on which the suit was founded was nonsuited or voluntarily dismissed his case in a United States Court, it was, nevertheless his right to bring another suit on the same cause of action in a state court at any time within the statutes of limitation applicable to such an action, and this is true notwithstanding that in a second suit the damages were laid in an amount

which would prevent another removal of the case to the Federal court."

Plaintiff in error says that said judgment of said Supreme Court of — is repugnant to and in conflict with the laws of the United States, and especially those several acts of the Congress of the United States commonly called the "removal acts," and of section 3 of that one approved March 3rd, 1887.

Plaintiff in error further says that the judgment of said Supreme Court of —, aforesaid is repugnant to and in conflict with Article XIV., sec. 1, of the Constitution of the United States, which declares that "no state shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law."

And denies to the plaintiff in error the privilege conferred upon it by law of having the cause of action and controversy involved in said proceedings removed to and determined by the District Court of the United States for the eastern division of the southern district of Georgia, which court had lawfully acquired jurisdiction of the subject matter and the parties in said cause.

Plaintiff in error says that in the aforesaid suit there was drawn in question the aforesaid removal acts of the Congress of the United States and the right of the city court of —, in the county of — and state of —, to entertain, hear, and determine said cause under the laws of the United States, and that the said decision of the Supreme Court of — was in favor of the jurisdiction and power of the said city court of — and adverse to the statutes of the United States aforesaid, and denied and refused the power, jurisdiction, and authority of the said District Court of the United States for the eastern division of the southern district of the state of Georgia to entertain, hear, and determine said proceedings; to which judgment and decision the plaintiff in error hereby excepts and assigns the same as error.

Wherefore the said Florida Railroad Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision.

R. X.,

G. X.,

Attorneys and of Counsel for Plaintiff in Error.

(1) See note to Form No. 1847.

The federal question must be set out in the assignment of error. *Central Vt. Ry. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433.

It is well settled that the decision of the federal question must have been necessary to the determination of the case, and must have been decided, or the judgment complained of could not have been rendered without its decision. *Adams v. Russell*, 229 U. S. 353, 57 L. Ed. 1224; and where other grounds of decision appear sufficient to support the judgment the Supreme Court will dismiss. *Sou. Pac. Co. v. Schuyler*, 227 U. S. 601, 57 L. Ed. 662; *Cornell Steamboat Co. v. Phoenix Constr. Co.*, 233 U. S. 593, 58 L. Ed. 1107; *Atl. Coast Line Co. v. Glenn*, 239 U. S. 388, 60 L. Ed. 344; *Rogers v. Hennepin Co.*, 240 U. S. 184, 60 L. Ed. 594; *Chicago, etc., Ry. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. Ed. 181.

**APPEALS FROM A DISTRICT COURT TO A CIRCUIT
COURT OF APPEALS.**

No. 1850.

**Petition for Appeal to a United States Circuit Court of
Appeals.(1)**

The District Court of the United States, } In Equity.
for the — District of —. } No. —

The above-named plaintiff [*or*, defendant], conceiving himself aggrieved by the decree made and entered on the — day of —, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the — circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the — circuit.

Y. & Y.,

Attorneys for Plaintiff.

The foregoing claim of appeal is allowed.(2)

H. F.,

Dated —.

District Judge.

(1) This petition, together with an assignment of errors, should be filed with the clerk of the court below and the appeal allowed by a district judge. R. S. Secs. 999 and 1012; *Rodd v. Heartt*, 17 Wall. 354; *Huntington v. Laidley*, 176 U. S. 668.

(1) An appeal must be taken within six months after the entry of the decree in the court below in equity and in admiralty cases. Act of March 3, 1891, Sec. 11, 26 Stat. L. 826. The mere filing of the petition and the assignment of errors in the clerk's office within the statutory

period is not sufficient. *Green vs. Lynn*, 31 C. C. A. 248, 87 Fed. Rep. 839, but is necessary. *Credit Co. Lm'td vs. Arkansas Ry. Co.*, 128 U. S. 258.

The time limit within which an appeal should be taken begins to run from the date of the entry of the decree. *Duncan vs. R. R. Co.*, 88 Fed. Rep. 840; *Coe vs. R. R. Co.*, 85 Fed. Rep. 489, 29 C. C. A. 292. In computing the time within which an appeal may be taken the date of the entry may be excluded. *Smith vs. Gale*, 137 U. S. 577.

An appeal in bankruptcy should be taken within ten days after the judgment appealed from. *Norcross vs. Nave & McCord Merc. Co.*, 4 Am. B. R. 317, 101 Fed. Rep. 796.

The petition for an appeal and an order allowing it constitutes a valid appeal. The bond and citation are not essential to it. *Edmonson vs. Bloomshire*, 7 Wall. 306; *Noonan vs. Chester Park Athletic Co.*, 35 C. C. A. 457, 93 Fed. Rep. 576.

Jurisdiction does not depend upon the amount in dispute in cases taken by writ of error or appeal from the District Courts to the Circuit Court of Appeals under the Act of March 3, 1891. *The Paquete Habana*, 175 U. S. 683; nor under the provisions of the Judicial Code.

The question has frequently arisen as to whether the appeal lies to a Circuit Court of Appeals or to the Supreme Court of the United States and the matter has been considered both by the Supreme Court and by the Courts of Appeals in the following cases: *Carter v. Roberts*, 177 U. S. 496; *Holt v. Indiana Mfg. Co.*, 46 U. S. App. 717, 176 U. S. 68; *U. S. v. Jahn*, 155 U. S. 109; *New Orleans v. Benjamin*, 153 U. S. 411; *Benjamin v. New Orleans*, 169 U. S. 161; *City of Owensboro v. Owensboro Water Works*, 115 Fed. 318; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1; *Dawson v. Trust Co.*, 102 Fed. 200.

(2) A formal order allowing an appeal is not necessary, although in practice such an order is entered on the journal of the court.

It has been held that the signing a citation or approving a bond was a sufficient allowance of an appeal. *Brandies v. Cochrane*, 105 U. S. 262; *Brown v. McConnell*, 124 U. S. 489.

Mistake in taking appeal or writ of error will not lead to dismissal; correction may be made in the reviewing court. See 39 Stat. L. 726, Act of September 6, 1916.

Statutory provisions—Judicial Code. Appeal or error, from the District Court to the Circuit Court of Appeals is limited in accordance with Judicial Code, Sec. 128; interlocutory order may be appealed from, according to Judicial Code, Sec. 129.

Sec. 130 provides for appeal in bankruptcy; Sec. 131 provides for appeals from the United States court for China; Secs. 134 and 135 deal with appeals from Alaska.

By Sec. 2 of the Act of January 28, 1915, 38 Stat. L. 802, the United States Circuit Court of Appeals may review upon appeal or error the final judgments and decrees of the Supreme Court of Hawaii and Porto Rico when the amount involved is more than \$5,000 exclusive of costs.

Porto Rico is attached to the first circuit by Act of January 28, 1915, 38 Stat. L. 803, by amending Judicial Code, Sec. 116 to that effect.

Appeal from Interlocutory Order. As introduced into the Judicial Code, Sec. 129 embodies some changes from the language of the prior acts passed in 1891, 1895 and 1900.

That the interlocutory order must be allowed upon a hearing in equity, see *Pressed Steel Car Co. v. Chicago R. Co.*, 192 Fed. 517, 113 C. C. A. 73; *Amer. Sep. Co. v. Twin City Co.*, 202 Fed. 202, 120 C. C. A. 644; the *Transfer*, No. 21, 218 Fed. 636, 134 C. C. A. 394.

This section does not apply to the case of an order refusing to dissolve a temporary restraining order. *Pack v. Carter*, 223 Fed. 638, 139 C. C. A. 184.

For a resume of the acts on this subject, see *Seattle Electric Co. v. Seattle Ry. Co.*, 185 Fed. 365, 107 C. C. A. 421.

As to the scope of the review under Sec. 129, see *Howe Mch. Co. v. Dayton*, 210 Fed. 801, 127 C. C. A. 351. Interlocutory order or decree will not be reversed if issued on recognized principles of equity and not improvidently. *Texas Co. v. Collier*, 195 Fed. 65, 115 C. C. A. 82.

Bill may be dismissed by Appellate Court. *Metro. Water Co. v. Kaw Valley, etc.*, 223 U. S. 519, 56 L. ed. 533.

As to the application of this section to patent infringement suits, see *Racine Co. v. Confectioners' Co.*, 234 Fed. 876, 148 C. C. A. 474; *Lederer v. Garage Equipment Co.*, 235 Fed. 527, 149 C. C. A. 73; *Ward Baking Co. v. Weber*, 230 Fed. 142, 144 C. C. A. 440.

In most of the circuits it is maintained that the court may dismiss the bill for infringement where the case comes before it on appeal from an interlocutory order concerning an injunction. *Sheffield Car Co. v. D'Arcy*, 194 Fed. 686, 116 C. C. A. 322.

Appeal Under Clayton Act. Under Sec. 11 of the Clayton Anti-Trust Act of October 15, 1914, 38 Stat. L. 730, orders may be issued by the Federal Trade Commission, the Federal Reserve Board or the Interstate Commerce Commission, respectively, to enforce compliance with Secs. 2, 3, 7 and 8 of said act, and upon failure to comply therewith the commission or board may apply to the Circuit Court of Appeals for enforcement of the order. The decision of that court is final, subject only to review by certiorari as provided in Judicial Code, Sec. 240.

The Circuit Court of Appeals also has exclusive jurisdiction of suits to enforce, set aside or modify the orders of the commission or board.

Judgment or Decree of the Circuit Court of Appeals. When the jurisdiction of the District Court is invoked solely on the ground of a federal question, no appeal lies to the Circuit Court of Appeals; but if such appeal is taken and entertained, and a decision is made in that court, the Supreme Court, acting in pursuance of Judicial

Code, Sec. 241, may review the question of jurisdiction, and its judgment should reverse the judgment appealed and should remand the case to the Circuit Court of Appeals with directions to dismiss the appeal. *City of N. Y. v. Consol. Gas Co.*, 252 U. S. —, 64 L. ed. —.

The guarantees of the seventh amendment to the constitution of the United States require the Circuit Court of Appeals, when reversing a favorable verdict and judgment in the District Court, to order a new trial; and a simple reversal is error. *Fidelity Co. v. Dubois Company*, 252 U. S. —, 64 L. ed. —. See *Slocum v. N. Y. L. Ins. Co.*, 228 U. S. 364, 57 L. ed. 879, where the subject is comprehensively considered.

No. 1851.

Plaintiff's Appeal from Refusal to Remand Removed Case.(1)

[Caption.]

The above named plaintiff, conceiving itself aggrieved by the orders of the aforesaid court heretofore made denying plaintiff's motion to remand said cause to the District Court of Iowa in and for Wapello County, does hereby elect to stand upon said motion, and to refuse to recognize the jurisdiction of this court in said cause, and to refuse to proceed further in this court in said cause; and under the provisions of section 238 of the Judicial Code, Act of March 3, 1891, plaintiff prays the order of this court allowing appeal direct from this court to the United States Supreme Court on said question of jurisdiction only; and that this court shall certify said question of jurisdiction as shown by the record herein.

And plaintiff herewith tenders a full, true and correct copy of the record in said cause, and prays the order of this court identifying the same, as attached hereto, as constituting plaintiff's bill of exceptions herein.

Plaintiff herewith accompanying respectfully submits suggested and requested form of judgment entry, and certificate, with form of citation, together with good and sufficient appeal bond properly executed, and prays approval of same, and an order of court making same a supersedeas, and for an

order granting certificate of this court as to jurisdiction upon said appeal, and an order dispensing with citation, or the allowance and signing of citation.

A. B.,
Attorney for Plaintiff.

(1) Forms Nos. 1851 to 1857, except 1854, are illustrative here; their proper place is following Form No. 1941.

No. 1852.

Judgment, Certificate and Appeal.

[Caption.]

The above named plaintiff, by its counsel in open court, conceiving itself aggrieved by the order overruling its motion to remand said cause heretofore entered, and by the order of the court now overruling its assignment of error and motion to reconsider said order, does now hereby formally elect to stand upon its said plea to the jurisdiction of said court embodied in its motion to remand said cause to the state court, and upon said assignment of error, and does now hereby formally refuse further to recognize the jurisdiction of this court, and refuses to proceed further in said cause, and whereupon the court in term time this — day of July 1917, does hereby dismiss plaintiff's petition and cause of action, and does hereby order and render final judgment that plaintiff take nothing thereby and go hence without day, and that defendant American Refrigerator Transit Company have and recover from said E. H. Emery and Company all costs in this Court in said action accrued, now taxed in the sum of — dollars.

And plaintiff, under the provisions of section 238 of the Judicial Code, praying the order of this court allowing an appeal from said order and judgment, direct to the Supreme Court of the United States, the court now certifies to said Supreme Court whether or not upon the record upon plain-

tiff's motion to remand said cause this court has jurisdiction of said action, or should said motion to remand be sustained.

And upon and for the reasons specified in its assignment of errors herein heretofore filed, the plaintiff does hereby pray and is allowed its appeal from the order overruling its motion to remand and from this judgment now rendered, such appeal being solely upon the question of jurisdiction of this court; and such appeal being hereby granted and certified direct to said Supreme Court of the United States.

Plaintiff having rendered its proper and sufficient appeal bond, same is hereby approved, and, when filed, is to operate as a supersedeas.

Such appeal having by plaintiff been taken and allowed in term time, in open court, and counsel for defendant being at the time present, his order allowing same shall operate as a citation to said defendant, American Refrigerator Transit Company, to be and appear to and upon said appeal, at the Supreme Court of the United States at Washington, within thirty days from the date of this order.

A transcript of the record, proceedings and papers upon which this judgment is made and based is hereby identified as plaintiff's bill of exceptions and attached hereto and made part hereof as Exhibit "A" and is hereby authenticated, and filed herein and certified as constituting the complete and correct record upon which this judgment and certificate is based.

M. W.,
Judge.

No. 1853.

**Petition for Appeal Alleging State Railway Commission's
Order to be in Violation of "Due Process."**

[*Caption.*]

The above named plaintiff feeling himself aggrieved by the decree made and entered in this cause on the 7th day of December, 1914, does hereby appeal from said decree to the

Supreme Court of the United States for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States sitting at Washington, District of Columbia.

The sole question in this case is whether an order passed by the Mississippi Railroad Commission on July 23, 1913, is confiscatory as against the plaintiff, in violation of the Constitution of the United States.

And your petitioner further prays that the proper order touching the security required of him to perfect his appeal be made.

M. and M.,
Solicitors for Plaintiff.

The petition granted and the appeal allowed upon giving bond, conditioned as required by law, in the sum of \$1000.00.

This the 20th day of March, 1915.

H. C. NILES,
Judge.

No. 1854.

Order Allowing Withdrawal of Appeal.

[Caption.]

On motion of defendant, D., for leave to withdraw his appeal heretofore taken without prejudice to the filing of a new appeal;

Ordered, that the petition for appeal, bond and order allowing appeal of D., heretofore filed, be, and they are hereby withdrawn, vacated and canceled without prejudice to the taking of a new appeal by said D.

H. H.,
Judge of District Court.

No. 1855.**Petition on Appeal from District Court to Supreme Court
on Denial of Temporary Injunction in Suit
Under Judicial Code, Section 266.****[Caption.]**

To the Honorable —, District Judge of the United States Court for the Western District of Washington:—

Puget Sound Traction, Light and Power Company, the above named plaintiff, feeling aggrieved by so much of the interlocutory decree rendered and entered in the above entitled cause on the 19th day of May, 1915, as denies the application of the plaintiff for a temporary injunction, and as refuses the plaintiff a temporary injunction restraining the above named defendants, and each of them from enforcing the order of the Public Service Commission of the State of Washington made on the 24th day of March, 1915, which order required the plaintiff to through-route its cars operated under its — franchises beyond the termini of such franchises, does hereby appeal from that part of said interlocutory decree herein mentioned to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record and proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, in the District of Columbia, under the rules of such Court in such cases made and provided.

Your petitioner shows that in the above entitled cause the petitioner claims that the order of the Public Service Commission of the State of Washington made on the 24th day of March, 1915, is a law of the State of Washington conflicting with the Constitution of the United States and with the Fourteenth Amendment thereof and that the amount in the above entitled suit and on appeal exceeds, exclusive of interest and costs, the sum of Five Thousand Dollars (\$5000.00).

And your petitioner further prays that the proper order relating to the security to be required of it be made.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY,

By A. B., its Solicitor.

No. 1856.

Certificate as to Jurisdictional Question by District Judge on Appeal to Supreme Court.

[*Caption.*]

In the above cause, I do certify that the decree of dismissal herein is based solely upon the ground that the court is of opinion that the court has no jurisdiction to grant any relief to the complainant; in reaching this determination I have considered the evidence solely to determine whether jurisdiction of the subject matter of the controversy exists in this court, and the evidence of the complainant (assuming it to be true for that purpose only), does not show such a transfer within the meaning of the laws of Congress relating to Bankruptcy, and to the United States court's jurisdiction in the matter of plenary proceedings by the trustee in bankruptcy to recover or reclaim property of the bankrupt transferred.

This certificate is made in conformity with the Judicial Code, section 238, so that the same may be certified and sent up as a part of the record and proceedings, in said cause.

Dated —.

B. D. E.,

United States District Judge for the

— District of —.

No. 1857.

Certificate of Judge of District Court to Supreme Court.

[*Caption.*].

In this case, I hereby certify that the judgment of dismissal herein is based solely on the ground that the cause

set forth in the Bill of Complaint, in my opinion, is not one arising under the patent laws of the United States, and no other ground of jurisdiction appears from the record in this case, and that the case is dismissed for want of jurisdiction for the reasons above stated.

This certificate is made conformable to Act of Congress of March 3, A. D. 1911, section 238; and the opinion filed herein is made part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

Dated this 12th day of August, A. D. 1913.

R. E. F.,

District Judge of the United States for the Eastern
District of Louisiana.

No. 1858.

Petition for Appeal with Prayer for Severance.(1)

— Court of the United States, District of —.

| | | |
|--|---|--|
| <p>The A. B. Co., a corporation under the laws of —, and a citizen of said state, Plaintiff.</p> <p style="text-align: center;">vs.</p> <p>F. B., A. S., M. P. and L. P., all citizens of —, and residents of —, Defendants.</p> | } | <p>In Equity. No. —.</p> <p>Petition for Appeal.</p> |
|--|---|--|

The above named defendants, C. Y., administrator of the estate of F. B., deceased, and A. S., conceive themselves aggrieved by the decree made and entered on the — day of —, A. D. —, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the — Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said

order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the — Circuit.

They further say that the defendants, M. P. and L. P. have refused to join in this appeal and the said C. Y., administrator, and A. S. aforesaid, further pray that a citation may issue and be served upon said M. P. and L. P. above mentioned requiring them to show cause why they should not join in this appeal or sever their interests from the interests of these appellants.

C. Y., Administrator, and A. S., by R. Y.,

Dated —.

Their Solicitor.

(1) See note to Form No. 1850.

All the parties against whom a joint decree is rendered must unite in a petition for appeal or the appeal will be dismissed unless there has been a summons and severance or some equivalent proceeding. *Hardee v. Wilson*, 146 U. S. 179; *Masterson v. Herndon*, 10 Wall. 416; *Humes v. 3rd Nat'l Bank*, 54 Fed. 917; *Hedges v. Seibert Cyl. Oil Cup Co.*, 50 Fed. 643.

Where a decree is severable in fact and in law one defendant may prosecute an appeal therefrom without joining a co-defendant who does not desire to appeal. *City Nat'l Bank v. Hunter*, 129 U. S. 557; *Brewster v. Wakefield*, 22 How. 118. An appeal by one of several defendants brings up so much of the case and such of the proceedings as are necessary for the determination of his rights. *Milner v. Meek*, 95 U. S. 252.

For form of notice of summons and severance, see Forms Nos. 1796 and 1860.

No. 1859.

Motion for Severance on Appeal.

[*Caption.*]

Now comes the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, defendants in the above entitled cause, and state and show to the court that they have filed their assignments of errors and petition for allowance of appeal from the final judgment and decree entered in the above entitled cause on August 13, 1917; that demand and notice to join in said appeal have been duly made and served upon each and all of their co-defendants;

that each and all of said co-defendants have failed, neglected and refused to join in said appeal, and have been duly notified to appear in the above entitled court and cause on November 5, 1917, and appeal or join in said appeal or show cause why an order of severance should not be made against them, barring their right to prosecute an appeal or appeals in the above entitled cause.

Wherefore, the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, defendants herein, pray the court for an order of severance from all their co-defendants for the purposes of an appeal to the Supreme Court of the United States from the final judgment and decree entered herein on August 13, 1917; and such other and further orders as may be proper in the premises.

J. W. D.,

Solicitor for Kansas City Gas Company, The
Wyandotte County Gas Company, Fidelity
Trust Company, and The Kansas City
Pipe Line Company.

No. 1860.

Notice of Motion for Severance.

[Caption.]

To the Defendants Above Named and Their Attorneys, Solicitors, and Counsel of Record:

Please Take Notice That the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company have filed in the above entitled court and cause their separate assignments of errors and their joint petition for the allowance of a joint appeal from the final judgment and decree entered in the above entitled cause on August 13, 1917, to the Supreme Court of the United States; that they have also filed in said court and cause their joint motion for severance on appeal

from said final judgment and decree, from you and each of you as co-defendants for the purposes of said appeal; and that said petition and motion will be called up for hearing, allowance and order in said court at the courtroom in Kansas City, Kansas, on November 5, 1917, or as soon thereafter as convenient to the court; and this is to demand of you that you join in said appeal or be and appear in said court at said time and place and show cause why an order of severance should not be made against you barring you and each of you from taking or prosecuting separate appeals in said cause. True copies of said motion for severance and petition for allowance of appeal are hereto attached.

J. W. D.,
Solicitor for Kansas City Gas Company, The
Wyandotte County Gas Company, Fidelity
Trust Company, and The Kansas City
Pipe Line Company.

Service of the above notice acknowledged and accepted
this 29th day of October, 1917.

H. J. S.,
Solicitor for Kansas City, Kansas.

No. 1861.

Order of Severance on Appeal.

[*Caption.*]

Now on this 5th day of November, 1917, this cause came on to be heard upon the joint motion of the Kansas City Gas Company, the Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company, and the motion of the City of Kansas City, Missouri, and the motion in open court of the Public Service Commission of Missouri for an order of severance on appeal in the above entitled cause and was argued by counsel and thereupon, upon consideration thereof;

It is found by the court that demand in writing has been duly made by the above named parties upon all their co-defendants to appeal or join in appeals from the final judgment and decree entered in the above entitled case to the Supreme Court of the United States, and that all said co-defendants have been duly notified in writing to appear and show cause why order of severance should not be made, and have failed to appear, or have appeared and have refused to join in the appeals of the parties above named, and,

It is further found that the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company, The Kansas City Pipe Line Company, the City of Kansas City, Missouri, the Public Service Commission of the State of Missouri and its members, Frank W. McAllister, Attorney General of the State of Missouri, the City of St. Joseph, Missouri, the City of Joplin, Missouri, and the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, Commissioners, and H. O. Caster, Attorney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney General for the State of Kansas, and the defendant cities in Kansas, have indicated their desire to appeal or join in appeals in this cause, and that they are entitled to a severance from their other co-defendants in this cause, therefore;

It is ordered that the above named defendants be and they are hereby granted a severance from all their co-defendants for the purpose of an appeal, or appeals, from the final judgment and decree entered in the above entitled cause to the Supreme Court of the United States.

It is further found and ordered that the rights of the Kansas City Gas Company, The Wyandotte County Gas Company, Fidelity Trust Company and The Kansas City Pipe Line Company are so separate from the rights of all their co-defendants that they are entitled to and are hereby granted a severance from all their co-defendants for the purposes of prosecuting a joint appeal from the final judgment and

decree of this court in this cause, entered on August 13, 1917, to the Supreme Court of the United States.

It is further found and ordered that the rights of the City of Kansas City, Missouri, and the Public Service Commission of Missouri, William G. Busby, Edwin J. Bean, David E. Blair, Edward Flad and Noah W. Simpson, as the Public Service Commission of Missouri, and Alex Z. Patterson, as attorney for said Public Service Commission, Frank W. McAllister, as Attorney General of the State of Missouri, and the cities of St. Joseph and Joplin, Missouri, are so separate from the rights of all their co-defendants that they are entitled to and are hereby granted a severance from their co-defendants for the purposes of prosecuting a joint appeal from the final judgment and decree of this court entered on August 13, 1917, to the Supreme Court of the United States.

It is further found and ordered that the rights of the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, Commissioners, and H. O. Caster, attorney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney General for the State of Kansas, and the defendant cities in Kansas, are so separate from the rights of all their co-defendants that they are entitled to and are hereby granted a severance from their co-defendants for the purposes of prosecuting a joint appeal from the final judgment and decree of this court entered on August 13, 1917, to the Supreme Court of the United States.

J. C. P.,
District Judge.

No. 1862.

Order of Severance Against Parties Failing to Join in Appeal.

[Caption.]

And now, to-wit, this 13th day of August, A. D. 1917, the above and foregoing petition being considered, it is

ordered and directed that S. S. Blair, W. E. Hoffman, et al., appellants, be permitted to enter a judgment of severance nunc pro tunc as of June 27, 1917, against those bond holders of the Crown Gasoline and Oil Company, who failed to join in the appeal of the said S. S. Blair, W. E. Hoffman, et al., within ten (10) days after the mailing to them at their last known address a written notice of the appeal taken in this case together with a copy of this order of court.

Per CURIAM.

Now, to-wit, August 29, 1917, it appearing to the court that notice of the appeal taken in the above case in accordance with the preliminary order of August 13, 1917, has been given to: [*here follow names*] being the bondholders of the Crown Gasoline and Oil Company; and that the afore-said bondholders have not joined in the appeal after notice. An order of severance is hereby entered against them in accordance with our preliminary order of August 13, 1917, and S. S. Blair, et al., are permitted to prosecute their appeal for the protection of their individual interests.

Per CURIAM.

No. 1863.

Order Allowing an Appeal and Severance.(1)

The Circuit Court of the United States for the — District of —.

A. B. Co., Plaintiff,

vs.

F. B., et al., Defendants.

This day came H. C., administrator, and W. A. and presented their petition for an appeal and an assignment of errors accompanying the same, which petition upon consideration of the court is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the — Circuit upon the filing of a bond in the sum of — dollars, (\$—) with good and sufficient security to be

approved by the court. And it further appearing that M. P. and L. P. have appeared in court and declined to join the said appeal, and it further appearing that C. W. was notified in writing to appear in court on the — of —, and either join in said appeal or decline to join in said appeal; and it further appearing that he has not appeared but has severed himself in his defense in this court, the said H. C., administrator, as aforesaid, and W. A. are hereby granted their several appeals as aforesaid, and their interests are severed in said appeal from the other defendants herein.

(1) All the parties against whom a joint decree is rendered must unite in a petition for appeal or the appeal will be dismissed unless there has been a summons and severance or some equivalent proceeding. *Hardee v. Wilson*, 146 U. S. 179; *Masterson v. Herndon*, 10 Wall. 416; *Humes v. 3rd Nat'l Bank*, 54 Fed. 917; *Hedges v. Seibert Cyl. Oil Cup Co.*, 50 Fed. 643.

Where a decree is severable in fact and in law one defendant may prosecute an appeal therefrom without joining a co-defendant who does not desire to appeal. *City Nat'l Bank v. Hunter*, 129 U. S. 557; *Brewster v. Wakefield*, 22 How. 118. An appeal by one of several defendants brings up so much of the case and such of the proceedings as are necessary for the determination of his rights. *Milner v. Meek*, 95 U. S. 252.

For form of notice of summons and severance, see Forms Nos. 1796 and 1860.

No. 1864.

Order Permitting Parties to Join in Appeal.

[*Caption.*]

This cause came on to be further heard on the 9th day of November, 1917, on the joint petition of The Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, members of said Commission, and H. O. Caster, attorney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney-General for the State of Kansas, and the defendant cities in the State of Kansas, for allowance of a joint appeal, and was argued by counsel, and on consideration thereof;

It Is Ordered That The Public Utilities Commission for the State of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, members of said commission, and H. O. Caster, attorney for the Public Utilities Commission for the State of Kansas, and S. M. Brewster, Attorney-General for the State of Kansas, and the defendant cities in the State of Kansas be and they are hereby granted and allowed a joint appeal from the final judgment and decree entered in the above entitled cause on August 13, 1917, as prayed for; that their bond on appeal be and is hereby fixed in the sum of three thousand dollars (\$3,000), to be approved by the clerk.

Signed at request of Judge B.

J. C. P.,
Judge.

No. 1865.

**Petition for Appeal Where Right Doubtful, After
Writ of Error.**

[*Caption.*]

To the Honorable Robert E. Lewis, Judge of the United States District Court for the District of Colorado:

The above named defendant, Union Pacific Railroad Company, conceiving itself aggrieved by the decree and judgment made and entered in the above numbered and entitled cause on the 22nd day of July, A. D. 1916, and in addition to the prosecution of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, under the laws of the United States in such cases made and provided, for the correction of the errors complained of and specified in its assignments of error, this day sued out, and desiring also to procure the allowance of an appeal to review the same adjudication, owing to the doubt which exists as to the proper proceeding to give appellate jurisdiction to said Circuit Court of Appeals for the Eighth Circuit in view of the issues, both of law and of fact, purely of equitable cognizance and triable solely by a court of chancery, presented by or arising in connection with that portion of the plaintiff's reply

therein designated as Subdivision IV, being "with reference to the allegations contained in the fifth affirmative defense" of the defendant's answer, does hereby appeal from said decree and judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignments of error which it has this day filed in this cause in connection with said writ of error this day sued out;

And said defendant prays that its appeal may be allowed; that its assignments of error, filed in connection with its petition for a writ of error, may be also treated and considered as its assignments of error in connection with this petition for allowance of appeal; that citation be issued as provided by law; and that, by order entered herein pursuant to the stipulation of the parties this day filed herein, it be directed that the transcript of the record, proceedings and papers, which will be transmitted by the clerk of this court to said United States Circuit Court of Appeals for the Eighth Circuit pursuant to the mandate of said writ of error this day issued, be treated, considered and duly authenticated as the transcript of the record, proceedings and papers upon which this appeal is based, and transmitted to said United States Circuit Court of Appeals for the Eighth Circuit for its consideration in connection with said appeal.

HUGHES & DORSEY,
JOHN Q. DIER,

Attorneys for Defendant, Union Pacific
Railroad Company.

No. 1866.

**Order Allowing Appeal and for Use of Transcript on
Writ of Error.**

[Caption.]

At Chambers, before the Honorable Robert E. Lewis, district judge, the following proceedings were had:

In this cause, on motion of counsel for the defendant, and it appearing to the court that the above named defendant has

heretofore filed herein its petition for the allowance of an appeal, and concurrently therewith its assignment of errors;

It is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the decree and judgment in this cause made and entered on the 22nd day of July, 1916, be and the same is hereby allowed to said defendant;

And it is further ordered that the transcript of the record, proceedings and papers, which will be transmitted by the clerk of this court to said United States Circuit Court of Appeals pursuant to the mandate of the writ of error in this cause this day sued out by the defendant, be treated, considered, and duly authenticated, as the transcript of the record, proceedings and papers upon which this appeal is based, and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal.

It is further ordered that the bond on said appeal be, and the same is hereby, fixed at the sum of ten thousand dollars, the same to operate as a supersedeas.

No. 1867.

**Notice of Appeal and Waiver in Habeas Corpus Proceedings
Where United States the Defendant.**

To the Judge and Clerk of Said Court and the Honorable
U. G. Denman, United States District Attorney:

You will hereby take notice that the petitioner in the above entitled case hereby appeals to the United States Circuit Court of Appeals of the Sixth Circuit of the United States of America, on the order, judgment and decree made and entered herein on the 20th day of November, 1914, dismissing the petition for writ of habeas corpus hereinbefore filed, and declaring the petitioner to be unlawfully within the United States, and ordering his deportation, according to law and in

pursuance with the order of the Acting Secretary of the Department of Labor, as more fully appears in the assignment of errors herein filed.

E. P. STRONG and
CLINE & MINSHALL,
Attorneys for Petitioner.

Cleveland, Ohio, December —, 1914.

The defendant above, the United States of America, acknowledges the receipt of notice of the filing of the petition for appeal herein, the allowing of said appeal, the assignment of errors, and now comes freely into court and avers there is no error in the record in this proceeding, nor in the judgment rendered therein, and defendant prays that the said United States Circuit Court of Appeals may proceed to examine the record in this proceeding as aforesaid as to all matters assigned for error herein and that the judgment aforesaid and forms aforesaid given may be in all things affirmed, and the said defendant hereby waives the issuing and service of citation or other process herein, and hereby enters the appearance of the defendant in the appeal herein taken.

U. G. DENMAN,
United States Attorney;
By CARY R. ALBURN,
Assistant United States Attorney.

No. 1868.

Petition and Order Allowing Cross-Appeal.

[*Caption.*]

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Associated Press, complainant in the above entitled cause, having obtained an allowance of an appeal from that portion of the order made by this court on the 13th day of April, 1917, denying its application for a injunction; and

your petitioner, International News Service, considering itself aggrieved by the order made by this court on the 13th day of April, 1917, in the above entitled proceeding, in so far as it grants a writ of injunction restraining the defendant

From inducing, procuring or permitting any telegraph editors or other employees or agents of the complainant or any of its members or any newspaper or newspapers owned or represented by them or any of them, or any such members, to communicate to defendant or to permit the defendant to take or appropriate, for consideration or otherwise, any news received from or gather for complainant, and from purchasing, receiving, selling, transmitting, or using any news so obtained,

From inducing or procuring, directly or indirectly, any of complainant's members or any of the newspapers represented by them, to violate any of the agreements fixed by the charter and by-laws of the complainant,

Does hereby petition for a cross-appeal from said order or decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that its cross-appeal may be allowed, and that a transcript of the record and evidence in said proceeding, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 13, 1917.

INTERNATIONAL NEWS SERVICE,

By W. F., its Solicitor.

The foregoing cross-appeal is hereby allowed this 13th day of April, 1917, and cost bond waived by consent.

A. N. H.,

United States District Judge.

A cost bond on the above cross-appeal is hereby waived

S., J. & R.,

Solicitors for Complainant.

No. 1869.**Petition for Appeal and Assignment of Errors by Intervenor.**

[*Caption.*]

Comes now the intervenor herein, the State of Iowa, and petitions this honorable court to allow an appeal from the judgment entered herein on October 21, 1915, to the United States Circuit Court of Appeals for the Seventh Circuit, and as cause therefor shows to the court the following:

ASSIGNMENT OF ERRORS.

1. The court erred in not holding that section 2419 of the Code of Iowa, as aided by the act of congress known as the Webb-Kenyon law, rendered illegal the proposed shipments of intoxicating liquors except in those instances in which the consignee was a permit holder.

2. The court erred in holding that the proposed transportation of liquors was not rendered illegal by sections 2421-a and 2421-b of the Supplemental Supplement to the Code of Iowa, 1915, as aided by said Webb-Kenyon law.

3. The court erred in holding that it was lawful under said statutes heretofore referred to to permit or require such intoxicating liquors to be delivered to a designated drayman, or to any other person except the consignee.

A. B. and C. D.,
Attorneys for Intervenor.

No. 1870.**Petition for Appeal by Receiver of National Bank at Order of Comptroller of Currency, Where Interpleader.**

[*Caption.*]

The above named plaintiff, Lloyd England, receiver for the State National Bank of Little Rock, Arkansas, conceiving himself aggrieved by the orders entered on the 21st day of April, 1916, and the 5th day of May, 1916, respec-

tively, in the above entitled proceedings, doth hereby, and at the direction of his superior, the Comptroller of the Currency of the United States, appeal from the said orders to the United States Circuit Court of Appeals for the Eighth Circuit, and he prays that this, his appeal, may be allowed; and that said orders be reversed and held for naught, and that judgment be given in conformity with the prayer of the petition and the answer to the interpleader's petition and that a transcript of the record and proceedings, and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Appellants also ask that an order be made and entered in accordance with section 1661, R. S. U. S., 1913, exempting the appellant from the statutory requirements relative to the furnishing of bond for the maintenance of this appeal.

A. B. and C. D.,
Attorneys for Plaintiff, Appellant.

LLOYD ENGLAND,
Receiver for the State National Bank of
Little Rock, Arkansas.

No. 1871.

**Petition for Appeal Where Refusal to Enjoin Prosecution of
Suit in State Court.**

[*Caption.*]

The above named defendants, conceiving themselves aggrieved by the decree made and entered on the 10th day of April, 1915, in the above entitled cause, whereby the bill of the plaintiff in the above stated cause was dismissed without prejudice, and injunction was denied to the defendants against the plaintiff, restraining and enjoining him from prosecuting a certain action brought by him, involving the same subject matter, in this Honorable, the Civil District Court for the Parish of Orleans and State of Louisiana, do hereby appeal from the order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for

the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

A. and B.,

Attorneys for Defendants.

No. 1872.

Petition for Appeal with Supersedeas.

[Caption.]

The petition of Louis Emanuel Jung, defendant herein, respectfully represents:

That petitioner is aggrieved by the judgment and decree herein rendered on May 3, 1916, in favor of complainant and against the said defendant, directing the issuance of a preliminary injunction in this case, and that petitioner, for the reasons specified in the assignment of errors filed herewith, desires to appeal from said decree, and desires that said appeal, returnable to the Circuit Court of Appeals for the Fifth Circuit shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said injunction.

Wherefore, petitioner prays that the said appeal may be allowed, and that, upon his giving bond in an amount to be fixed by this court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said injunction; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit, according to law, and that a transcript of the records, proceedings and papers and exhibits upon which said decree was rendered, duly authenticated, be sent to said Circuit Court of Appeals.

And petitioner prays for all general and equitable relief.

A. B. and C. D.,

Solicitors for Defendants.

No. 1873.**Order Allowing Appeal with Supersedeas.**

[*Caption.*]

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to Louis Emanuel Jung, petitioner herein; and defendant in this suit, from the decree of May 3, 1916, rendered against said defendant in the above entitled and numbered cause, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, and that, upon the execution of a bond in the penalty of five thousand dollars said appeal shall operate as a supersedeas of said decree and shall suspend, until the final decree or appeal herein, the effect of the injunction herein, and that a transcript of the record, including all the exhibits offered in evidence by either party, be filed in the United States Circuit Court of Appeals, according to law, as prayed for.

R. E. F.,

Judge. •

No. 1874.**Order Allowing Appeal, Denying Supersedeas.**

[*Caption.*]

At a stated term, to-wit, the January Term, A. D. 1914, of the District Court of the United States for the District of Kansas, held at the court room in the City of Kansas City, County of Wyandotte, State of Kansas, on the 24th day of January, 1914, present: The Honorable Smith McPherson, United States District Judge presiding in the said District Court of the United States for the District of Kansas, sitting in equity, in John L. McKinney, Fidelity Title & Trust Company vs. Kansas Natural Gas Company, No. 1351, and Fidelity Title & Trust Company vs. Kansas Natural Gas Company and Delaware Trust Company No. 1-N, on motion of J. W. Dana, solicitor and counsel for complainants, the

Kansas City Pipe Line Company and Fidelity Trust Company, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the decree heretofore filed and entered herein on the 24th day of January, 1914, be and the same hereby is allowed;

It is further ordered that the bond on appeal will be in the penalty of Two Hundred Dollars (\$200.00), and a bond for costs in the penalty of Two Hundred Dollars (\$200.00), but said appeal and bond will not be a supersedeas unless the refusal thereof is vacated by said Circuit Court of Appeals as recited in the decree and orders of this day.

Done in open court this January 24, 1914.

SMITH MCPHERSON,
Judge.

No. 1875.

**Order of Circuit Court of Appeals Allowing Supersedeas and
Fixing Bond Therefor, Where Denied by District Court.**

[*Caption.*]

Now on this 21st day of March, 1914, this cause came on to be heard upon the application and petition of the appellants for an order allowing a supersedeas in the above entitled cause and fixing the amount of the bond therefor; appellants appearing by J. W. Dana and W. C. Scarritt, their solicitors, and the Fidelity Title & Trust Company and John L. McKinney, appearing by Charles Blood Smith, their solicitor. Kansas Natural Gas Company, appearing by John J. Jones, its solicitor, Delaware Trust Company appearing by J. B. Tomlinson, its solicitor, George F. Sharitt, appearing by John J. Jones, his solicitor, and John M. Landon and R. S. Litchfield, appearing by John H. Atwood and Chester I. Long, their solicitors, and the court being fully advised in the premises:

It Is Ordered, That the orders and decrees of the District Court of the United States for the District of Kansas in said

case entered on January 24, 1914, be superseded insofar as the same direct the receiver of said court, George F. Sharitt, to deliver to John M. Landon and R. S. Litchfield the cash funds and moneys in the possession of the said receiver at the time the said order was made and which now remain in his possession; but this supersedeas shall not control the possession and disposition of funds coming into the possession of said receiver since January 24, 1914, and this order shall become effective upon the appellants filing in this court a supersedeas bond in the sum of \$50,000.00, to be approved by a judge of this court.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals Eighth Circuit.

Seal

Endorsed: Filed in the District Court on March 23, 1914.

No. 1876.

Application for Appeal and Order Thereon in Open Court.

[Caption.]

The said above named complainants in the above entitled cause feeling themselves aggrieved by the order of said court in said cause denying the application of complainants for an interlocutory injunction therein which said order was heretofore entered in said court in said cause, to-wit, on the 23rd day of March, A. D. 1916, the said complainants do hereby pray an appeal in open court from the said order to the Circuit Court of Appeals for the Fifth Circuit and pray that their appeal may be allowed and that a true copy or transcript of the record, papers and proceedings upon which said order was made and in said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, as provided by law.

And complainants further pray for an order staying other proceedings in said cause in said District Court until said

appeal shall have been heard, passed upon and disposed of by said Circuit Court of Appeals.

A. B. and C. D.,
Counsel and Solicitors for Complainants.

The above and foregoing application for appeal, coming on to be heard this 12th day of April, A. D. 1916, and the Assignment of Errors of complainants filed in said cause being presented to the court with said application for appeal, it is ordered in open court that the said appeal be allowed as prayed for.

It is further ordered that further proceedings in said cause in said District Court be stayed until said appeal shall have been heard, passed upon and disposed of by said Circuit Court of Appeals.

Appeal bond fixed at \$500.00.

R. M. C.,
Judge.

No. 1877.

Petition by Receiver for Appeal, and Order of Court Thereon.

[*Caption.*]

To the Honorable A. B., Judge of the District Court of the United States for the Northern District of Texas:—

The petition of Guy W. Faller, Receiver Amarillo Street Railway Company, defendant in the above numbered cause, with respect represents:—

That said Receiver feels himself aggrieved by the decree made and entered in this cause on the 28th day of July, 1917, in so far as said decree establishes and fixes a lien in favor of City of Amarillo, Intervener, against the property of Amarillo Street Railway Company in the hands of said Receiver, ordering said Receiver to pay over to the City of Amarillo the sum of \$6050.00 so soon as said city shall pave along the tracks of Amarillo Street Railway Company, on Polk street, in Amarillo, Texas, from the south side of

Tenth street to the south side of Seventeenth street, or so much of said \$6050.00 as may be necessary to reimburse the city for the cost of said pavement, and desires to appeal from said decree to the United States Circuit Court of Appeals for the Fifth Circuit.

Your petitioner presents herewith and makes a part of this petition an assignment of error in said cause, and desires to supersede the execution of said decree, and therefore petitioner here tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued, and therefore your petitioner prays that this petition may be allowed and that a transcript of the whole record, proceedings, testimony and papers upon which said decree was made, duly authenticated, be sent to the Circuit Court of Appeals for the Fifth Circuit, in the maner and form and at the time prescribed by law and by the rules of said Circuit Court of Appeals.

Petitioner further prays that citation of appeal issue and be served upon City of Amarillo, Intervener, Emile K. Boisot, Trustee, plaintiff, and Amarillo Street Railway Company, defendant herein, according to law and in accordance with the rules of procedure in such cases, and petitioner prays that he be permitted to prosecute this appeal at the cost of the property in his hands.

Petitioner prays for all orders necessary in the premises and for a general relief.

A. B.,

Attorney for Receiver.

No. 1878.**Order Permitting Receiver to Appeal and Granting
Supersedeas.**

[*Caption.*]

The above and foregoing petition being considered, it is ordered that the appeal prayed for by Guy W. Faller, Receiver, in the above entitled and numbered cause, to the United States Circuit Court of Appeals for the Fifth Circuit, be, and the same is, hereby granted and allowed, and said appeal may be prosecuted by said Receiver at the cost of the property in his hands, and the appeal bond this day presented by Guy W. Faller, Receiver, signed by Guy W. Faller, Receiver as principal, and the United States Fidelity & Guaranty Company as surety, dated 11th day of September, 1917, in the sum of \$8000.00, conditioned as required by law, has this day been approved by me, and it is ordered that citation of appeal issue and be served upon the plaintiff, Emile K. Boisot, Trustee, or his attorney of record, City of Amarillo, Intervener, or its attorney of record, and Amarillo Street Railway Company, or its attorney of record, and that said appeal be made returnable to said Circuit Court of Appeals for the Fifth Circuit, according to law and in accordance with the rules of said court.

It is further ordered that said appeal shall operate as a supersedeas from the decree in this cause, awarding to the City of Amarillo, Intervener, a lien against the property in the hands of said Receiver, and requiring the payment to said City of Amarillo of the sum of \$6050.00, upon the completion of the paving mentioned in said decree.

Thus done, read and signed, in chambers, at Abilene, Texas, in the Northern District of Texas, this the 17th day of September, 1917.

G. W. J.,

United States District Judge.

No. 1879.**Petition on Appeal and Assignment of Errors.(1)****[Caption.]**

The above named defendant, F. F. Doane, believing himself aggrieved by the final decree in the above entitled cause, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of such part of the record as the parties to this cause shall by praecipe duly indicate, together with the exhibits and evidence herein stated in simple and condensed narrative form, so far as it relates to any of the claims on which error is predicated or any matter indicated by the defendant and also the judgment herein rendered, all duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had which may be proper in the premises.

And the defendant, F. F. Doane, hereby assigns the errors asserted and intended to be urged as follows:—

1. That the court was in error in overruling the motion of the defendant to dismiss the action for want of jurisdiction based upon the ground that there was pending in the State Court of California an action by the defendant herein against the predecessors in interest of the plaintiff herein; said motion being based upon the further ground that the corporation plaintiff herein was formed for the purpose of ousting said State Court of jurisdiction to try the issues involved in this case, and for the purpose of creating a case cognizable within the United States District Court;
2. That the court was in error in declaring the declaration of trust, "Exhibit A," attached to defendant's answer, to be a trust deed.
3. The court was in error in declaring that the defendant had no interest in said property as set forth in the decree or judgment herein.

Wherefore, the defendant, F. F. Doane, prays that said final decree of the District Court of the United States for the Southern District of California, Northern Division, sustaining the plaintiff's bill, may be reversed, and that said court may be ordered to enter a decree in accordance with the prayers in said answer dismissing said bill, or in such other form as to said Circuit Court of Appeals for the Ninth Circuit shall seem just.

(Date.)

F. F. D.,

By X. Y., his Attorney.

(1) The union of these in one paper is unusual although apparently proper. Rule 35 of the Supreme Court Rules and Rule 11 of the Rules of Circuit Court of Appeals, provide for the filing of an assignment of errors with the petition for appeal, and that no appeal shall be allowed until such assignment of errors has been filed, but a plain error unassigned may be noticed.

The purpose of this rule is set out in *Phillips and Colby Const. Co. v. Seymour, et al.*, 91 U. S. 646, 648 (23 L. Ed. 642), where the court says: "The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to these points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on."

A multitude of cases notices the rule, and among later cases are the following: In *Weems v. U. S.*, 217 U. S. 349 (54 L. Ed. 793), a criminal case was under consideration, and the court says that Rule 35 "is not a rigid rule controlled by precedent, but confers a discretion exercisable at any time, regardless of what may have been done at other times."

In *Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547 (54 L. Ed. 877), the errors were specified in the brief for plaintiffs. Defendants made no objection for failure to assign error in accordance with R. S. U. S. Secs. 997 and 1012, but submitted the case on the specifications in the brief of plaintiffs. The court thereupon under Rules 21 and 35 looked into the transcript to see whether any "plain error" had occurred, but clearly pointed out that the statutes and the rule required an assignment of errors.

In *Willamette & Columbia River Towing Co. v. Hutchison*, 236 Fed. 908 (9th Cir.), the Court of Appeals reviewed decisions in the 6th, 7th and 8th Circuits, concerning the application of Rule 11,

and adopts the view set out in the 6th Circuit in *P. P. Mast & Co. v. Superior Drill Co.*, 154 Fed. 45, viz.: "The purpose of declaring that the court at its option may notice a plain error not assigned is to prevent the miscarriage of justice from oversight, and that it does not intend that the court is to sift the record and deal with questions of small importance, but only that it may notice errors which are obvious and of a controlling character."

In the 7th Circuit in *Hultberg v. Anderson*, 203 Fed. 853, the court held that the requirements of Rule 11 is "not jurisdictional, but is a rule of practice, and that the court may punish the appellant by dismissal for non-compliance with the rule, or it may hear the controversy and decide the merits as justice may seem to require in the particular case."

Further, the court here construed the decisions in the 8th Circuit mentioned not as denying jurisdiction to the Court of Appeals there where no assignment of errors was filed in due time, but as meaning that the rule (11) was an indispensable rule in practice.

In the case under consideration the 9th Circuit Court of Appeals found that there was no plain and obvious error on the face of the record, and that since there was no assignment of errors filed until after the allowance and issuance of the writ of error, the writ was dismissed.

In *Painter v. Union Trust Co.*, 246 Fed. 240, no error was assigned concerning a contention arising on an application to set aside a sale on foreclosure, and order confirming it; the question was raised in the Appellate Court, which found that if there was error it did not appear so plainly on the record as to warrant its consideration under Rule 11, and not being assigned, it was not considered.

See also, *Simkins' "A Federal Equity Suit,"* 3d ed., pp. 670 to 675; *Dewhurst's "Rules of Practice, etc.,"* 2d ed., pp. 172 and 239,

No. 1880.

Summons and Severance in Bankruptcy Proceedings.

In the District Court of the United States for the — District of —.

Messrs. E. F. and G. H. are hereby notified that at ten (10) o'clock a. m., at the court room for said court in —, on —, the undersigned, D. G., will present to said court his petition for appeal from the judgment or decree rendered and entered September 20th, 1899, in the proceedings in bankruptcy in said court, in which A. B. & Co. and others are petitioners and C. D. & Co. and others are defendants or opposing parties. Said E. F. and G. H. are hereby notified that the undersigned, D. G., is about to take said appeal, and they are hereby invited to unite therein, or failing therein, they will be made appellees.

D. G.
X. & X.,
Attys. for D. G.

No. 1881.

Petition for an Appeal in Admiralty by Claimants of Vessel (1).

The District Court of the United States for the — District of —. In Admiralty.

The A. B. Transit Company,

vs.

H. J., P. L., claimants, and the American Surety Company of New York, their sureties,
Respondents.

The above named H. J., P. L., claimants of the schooner *Helvetia*, and the American Surety Company of New York, their surety, feeling themselves aggrieved by the final decree of this court entered —, allowing the claim of libellant in

this cause, hereby claim an appeal from said decree and from the whole thereof to the United States Circuit Court of Appeals for the — Circuit, and pray that said appeal may be allowed, and the record in said cause duly transcribed and certified to said United States Circuit Court of Appeals, to be heard upon the pleadings and proofs as shown by such record, and that this court will fix the penalty of the appeal bond to be given herein.

H. J., P. L.,
Claimants.

The American Surety Company,
Surety.

By R. Y.,
Their Proctor.

(1) See note to Form No. 1359.

No. 1882.

Petition for an Appeal in Admiralty by Libellants (1).

The District Court of the United States for the — District
of —. In Admiralty.

C. P. and Estate of J. D.

vs.

The Str. "Centurion," her engines, etc.

Now comes said libellants, C. P., and Estate of J. D., as trustees for the underwriters on the Str. "J. D. Marshall," and feeling aggrieved by the decree and opinion to which it refers, which said decree as made on the — day of —, dismissing the libel filed herein, do hereby appeal from said decree, with the object of obtaining a reversal of the same and securing a decree for libellants' damages as claimed, to the United States Circuit Court of Appeals for the — Circuit.

Said libellants pray that their appeal may be allowed and that the records in said cause may be duly transcribed and certified to said Circuit Court of Appeals, to be there heard,

upon the pleadings and proofs as shown by such records. And that this court will fix the penalty of the appeal bond to be given herein.

Dated at —, this — day of —, A. D., —.

C. P.,

Estate of J. D.

By R. Y.

Proctor for Libelants & Appellants.

(1) See note to Form No. 1359.

No. 1883.

Petition for Appeal in Admiralty.

[*Caption.*]

To the Honorable Judges of the United States Circuit Court of Appeals for the — Circuit:

A. B., the libellant and appellant herein, respectfully shows as follows:

First. On or about the — day of —, 1894, the libellant filed a libel in the district court of the United States for the — district of — against the above-named schooner, in a cause civil and maritime, to recover the sum of — dollars for damages alleged to be due the libellant from said schooner, with interest and costs, as by reference to said libel will more fully appear.

Second. On or about the — day of —, 1894, the claimant duly appeared and filed his answer to said libel, praying that the libel be dismissed with costs, as by reference to said answer will more fully appear.

Third. In —, 1894, said cause came on for hearing before the Honorable G. W., judge of the said district court, and such proceedings were had that on the — day of —, 1894, a final decree was made and entered in said suit, whereby it was adjudged that the libel be dismissed and that the claimants recover the sum of — dollars as costs.

Fourth. The above-named libellant and appellant is advised and insists that said final decree is erroneous in that it does not decree payment of the libellant's claim with interest and costs.

Fifth. For this and other reasons the above-named libellant and appellant appeals from said final decree to the United States Circuit Court of Appeals for the — Circuit, and on said appeal intends to seek a new decision on the law and on the facts, upon the pleadings and proof in said District Court and upon new pleadings and proofs to be introduced in this court, and prays that the record and proceedings aforesaid may be returned to the United States Circuit Court of Appeals for the — Circuit, and that said decree may be reversed and the libellant be decreed payment of his claim with interest and costs in the District Court and in this court.

X. & X.,

Proctors and Appellant.

No. 1884.

Petition for Appeal in Admiralty.

[*Caption.*]

Now comes the Great Lakes Towing Company, respondent herein, and feeling itself aggrieved by the final decree herein entered on March 17, 1916, confirming the report of the Commissioner, finding the respondent's tugs E. M. Pierce and Excelsior solely at fault for the stranding of the steamer Percival Roberts, Junior, as mentioned in the libel, and for the damages resulting from the stranding and striking, and for finding in the said decree that the said stranding and collision with resulting damages was due to the fault of said tugs and without fault on the part of said steamer Percival Roberts, Junior, or those in charge thereof, and decreeing that libellant The American Shipbuilding Company, should recover of the Great Lakes Towing Company, respondent, the sum of \$7,483.22, with interest from February 1, 1913, and costs,

does hereby claim an appeal from said final decree and the whole and every part thereof to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that said appeal may be allowed and does hereby present its assignment of errors and prays that said cause may be certified to the said Circuit Court of Appeals for the Sixth Circuit, and that this court may fix the amount of bond to be given by said appellant on appeal.

G. & W.,

Proctors for The Great Lakes Towing Co.,
Respondent and Appellant.

No. 1885.

Petition for Appeal in Bankruptcy.(1)

The District Court of the United States for the — District
of —.

In the Matter of L. W., doing business as L. } No. —
W. & Son, Bankrupt. } In Bankruptcy.

Petition on appeal of B. Y., trustee in bankruptcy, of L. W., doing business as L. W. & Son, Bankrupt.

The above named B. Y., trustee in bankruptcy, considering himself aggrieved by the judgment made and entered on the — day of —, in the above entitled cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the — Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and paper upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the — Circuit.

R. S.,

Attorney for B. Y., Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

A. C.,

District Judge.

(1) An appeal lies from a court of bankruptcy to the Circuit Court of Appeals in three classes of cases specified in Sec. 25 of the Bankruptcy Act of 1898 and in no other cases.

The petition for appeal and the allowance must be made within ten days after the entry of the judgment appealed from. *Norcross v. Nave & McCord Merc. Co.*, 101 Fed. 796, 4 Am. B. R. 317; Bankruptcy Act, Sec. 25a.

No. 1885a.

For forms on appeal to the Court of Customs Appeals, see Forms Nos. 1021 to 1044.

No. 1886.

**Petition for Appeal to the Circuit Court of Appeals in
Habeas Corpus.**

The District Court of the United States — District of ——. In re application of L. H., for a writ of *habeas corpus*.

The United States, by their attorney, J. H., feeling themselves aggrieved by the order and judgment, entered on the — day of —, 1894, in the above-entitled proceeding, do hereby appeal from the said order to the Circuit Court of Appeals for the — Circuit, and pray that their appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the Circuit Court of Appeals of the — judicial circuit of the United States.

J. H.,
United States Attorney.

No. 1887.

Petition for Appeal by Collector of Customs.

[Caption.]

Dudley Field Malone, Collector of Customs at the Port and Collection District of New York, one of the defendants in the above entitled cause, feeling himself aggrieved by the

order of the United States District Court for the Southern District of New York, dated March 17, 1916, and filed with the clerk of said court on March 18, 1916, hereby appeals from that part of said order which enjoins him from detaining or withholding from the plaintiff any "Eternelle" violin strings owned by him of the manufacture of C. A. Mueller, and enjoins him to enter to the United States and deliver to the plaintiff upon payment of the lawful customs duties, etc., the "Eternelle" violin strings owned by plaintiff and consigned to it and held and detained by said Collector of Customs to the United States Circuit Court of Appeals for the Second Circuit, for the reason specified in the Assignment of Error which is filed herewith, and prays that this, his appeal, may be allowed and a citation issue directed to the plaintiff Fred Gretsch Mfg. Company, commanding it to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises and that a transcript of the record, proceedings and papers in said cause, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 13, 1916.

DUDLEY FIELD MALONE,
Collector of Customs.

By H. S. M.,
U. S. Attorney for the Southern District of
New York, his Solicitor.

The foregoing appeal is hereby allowed this 14th day of April, 1916.

LEARNED HAND,
U. S. District Judge.

No. 1888.**Notice of Appeal from District Court in Chinese Deportation Case.(1)**

The District Court of the United States for the — District of —.

The United States
vs.
Yee Ah N'Goi. } No. —.

To the judge and clerk of said court and to J. H., United States Attorney for the — District of —.

You will please take notice that Yee Ah N'goi, defendant, in above-entitled action or proceeding, hereby appeals to the United States Circuit Court of Appeals for the — Circuit, made and entered herein on the — day of —, affirming the order of deportation herein, and from the whole and each and every part thereof. R. Y.,

Attorney for said Defendant.

(1) Under Sec. 13 of the Chinese Exclusion Act, 25 Stat. L. 479, an appeal lies from the District Court to the Circuit Court of Appeals from a judgment of the District Court rendered on an appeal from an order of a commissioner for deportation. U. S. v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93; Leo Lung On v. U. S., 159 Fed. 125, 86 C. C. A. 513.

No. 1889.**Order Allowing Appeal to Circuit Court of Appeals in Chinese Deportation Case.(1)**

[Caption.]

In this case, on motion of R. Y., Esq., attorney for the defendant, it is ordered that an appeal from the order affirming the judgment of deportation made by United States Commissioner E. H., to the United States Circuit Court of Appeals, for the — Circuit, be, and the same is hereby, allowed; and further ordered that the bond for costs be, and the same is hereby, fixed in the sum of — dollars.

(1) See note to Form No. 1888.

No. 1890.**Motion and Order of Appeal in Chinese Deportation Case.**

[Caption.]

On motion of Joseph W. Montgomery, Assistant United States Attorney for the Eastern District of Louisiana, counsel for Respondent Joseph H. Wallis, Assistant Commissioner of Immigration and at this time Acting Commissioner of Immigration at the Port of New Orleans, and the United States of America, and on suggesting error to the prejudice of said respondent and the said United States of America in the judgment rendered in this case on January 24, 1914, discharging Ng Sam, Yee Ngau, Ng Tin and Ng Sing from custody and on further suggesting the assignment of errors herewith filed and on further suggesting that the said mover is hereto directed by the Department of Justice.

It is ordered that an appeal be granted to said respondent Joseph H. Wallis, Assistant Commissioner of Immigration and at this time Acting Commissioner of Immigration and the said United States of America to the United States Court of Appeals for the Fifth Circuit, returnable within thirty (30) days after this date at New Orleans, and that said Respondent Joseph H. Wallis, Assistant Commissioner of Immigration and at this time Acting Commissioner of Immigration and the United States of America be dispensed from giving bond on said appeal.

R. E. F.,
Judge.

New Orleans, July 18, 1914.

No. 1891.**Assignment of Errors Where Writ of Habeas Corpus Maintained in Chinese Deportation Case.**

[Caption.]

And now comes Respondent, Joseph H. Wallis, Assistant Commissioner of Immigration at the Port of New Orleans, praying for an appeal and assigns the following errors in the proceedings, judgment and decree of the trial court in this case.

First. The court erred in maintaining the said Writ of Habeas Corpus and in making the same absolute, for the reason that the court had no jurisdiction to pass upon the issues involved in the case for the reason that the said Ng Sam, Yee Ngau, Ng Tin and Ng Sing were held in custody by Respondent under and by virtue of a writ of arrest issued under date of November 22, 1913, by the Acting Secretary of Labor, commanding John H. Clark, United States Commissioner of Immigration at Montreal, Canada, or any Immigrant Inspector in the service of the United States to take the said Ng Sam, Yee Ngau, Ng Tin and Ng Sing into his custody and grant them a hearing to show cause why they should not be deported in conformity with law in that they were aliens and members of the excluded classes unlawfully within the United States in that they entered the United States without inspection and at a time and place other than as designated by the Immigration officers of the United States in violation of section 36 of the act of congress, approved February 20, 1907, as amended by the act of congress, approved March 26, 1910;(1) and in that they entered in violation of section 21 of the act aforesaid in that they were in the United States in violation of the Chinese Exclusion Laws; and in that they were persons likely to become public charges at the time of their entry into the United States; and that the said Ng Sam, Yee Ngau, Ng Tin and Ng Sing were examined and given hearings according to law and at the said hearings each of said Relators was given a full opportunity to show cause why he should not be deported and that the Acting Secretary of Labor, after reviewing the evidence, became and was satisfied that Relators and each of them was unlawfully within the United States for the reasons aforesaid and issued an order of deportation of said Relators to China, the country from which they came; and that all the proceedings were regular and according to law and that Respondent held Relators by virtue of the said orders of arrest and deportation and that the said decision

of the Acting Secretary of Labor was final and the court was without authority to review same.

Second. The court erred in holding that because the Acting Secretary of Labor found that Relators entered the United States via Canada, the Acting Secretary of Labor was without authority to order deportation to China.

Third. The court erred in holding that it acquired jurisdiction to look into the merits of the case on the ground that Relators were ordered deported to China.

Fourth. The court erred in holding that burden of proof to show lawful status in the United States was not upon the Relators but that the burden was upon the government to show that they were unlawfully within the United States and had entered within three (3) years.

Fifth. The court erred in holding there was no evidence to show when the four (4) Relators came into the United States except their own testimony and nothing to show they came from Canada or that they were liable to become public charges.

Sixth. The court erred in holding that the four (4) Relators had been in the United States for more than three (3) years and that disregarding their testimony there was nothing left to show they had not been in the United States three (3) years.

Seventh. The court erred in discharging Relators without affording the Immigration Service an opportunity to correct the warrant if erroneous, as to the place of deportation.

For these and other reasons apparent on the face of the record, Respondent prays that the decree herein rendered be reversed and that the judgment and order of the United States District Court be set aside and that there be judgment dismissing the Writ of Habeas Corpus.

J. W. M.,

Assistant United States Attorney and Counsel
for Respondent.

(1) See note on page 419 under Form 308 for effect of later acts on the early acts.

No. 1892.**Stay Order Allowing Appeal and Bond.**

[Caption.]

Ordered, that an appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree made and entered herein on the 25th day of September, 1916, be and the same is hereby allowed, and it is further

Ordered, that this appeal shall operate to suspend and stay fulfillment of the decree of the court that plaintiff execute and deliver to the defendant Vincent Bendix a license in writing, until the determination of said appeal, and it is further

Ordered, that this appeal shall operate to suspend and stay fulfillment of the said decree; that execution shall issue for the costs of this suit to be taxed.

JOHN R. HAZEL,
United States District Judge.

No. 1893.**Order Granting Appeal in Bankruptcy, Severing Co-defendants and Allowing Supersedeas.**

The District Court of the United States for the — District of —.

A. B., et al., Petitioners,

vs.

C. D., et al., Respondents.

The defendant, D. G., having heretofore filed herein his petition for appeal and assignment of errors, and having given notice to E. F. and G. H., and they failing to appear, said appeal is allowed to petitioner, and said E. F. and G. H. may be made appellees.

Said appeal is to operate as a supersedeas of the decree of —, but not to affect the injunction granted —, upon the execution of a bond in the penalty of \$—.

The United States Fidelity and Guaranty Company of Baltimore, Maryland, is accepted on said bond as surety, and said bond is now approved.

No. 1894.**Entry Allowing Appeal in Habeas Corpus.**

The District Court of the United States — District of ——.
In re application of L. H.,
for writ of habeas corpus.

And now, to-wit, on the — day of —, 1894, it is ordered that the appeal be allowed as prayed for. And it is further ordered that said petitioner, L. H., may, at any time pending said appeal, be enlarged upon executing a recognizance, with sureties in the sum of — dollars, to the satisfaction of the clerk of this court, for his appearance to answer the judgment of the court of appeals, and upon failure thereof to give bail, to remain in the custody of the warden of the — penitentiary.

G. W.,
District Judge.

No. 1895.**Order Allowing Cross-Appeal.**

[Caption in Trial Court.]

This day came the complainant herein by its counsel, and presented the petition for a cross-appeal and an assignment on errors accompanying the same, which petition upon consideration of the court is hereby allowed and the court allows a cross-appeal to the United States Court of Appeals for the — Circuit upon the filing of a bond in the sum of five hundred dollars (\$500.00) with good and sufficient security to be approved by the court.

No. 1896.**Order Allowing Cross-Appeal (Another Form).**

[Caption.]

The plaintiffs herein by their counsel, having presented a petition for cross-appeal herein, together with an assignment of errors,

Ordered that said cross-appeal be and the same is hereby allowed to the Circuit Court of Appeals of the Seventh Circuit upon the filing of a bond in the sum of \$—— to be approved by the court.

Further Ordered, that the transcript of record heretofore ordered to be filed in connection with defendant's appeal is to be used for the consideration of this cross-appeal, the plaintiffs herein being only required to print the papers pertaining to this their cross-appeal, to be added to such transcript.

Dated, June 13, 1917. Enter

CARPENTER,
Judge.

No. 1897.

Plaintiffs' Petition for Allowance of Cross-Appeal.

[*Caption.*]

The above named plaintiffs conceiving themselves aggrieved by the order and decree of the court made and entered herein January 3, 1917, do hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors filed herewith, and pray that this cross-appeal may be allowed and that a transcript of the record heretofore ordered to be filed in connection with defendant's appeal may be used in the consideration of this cross-appeal, the plaintiffs herein being only required to print the papers pertaining to this their cross-appeal, to be added to such transcript.

Dated June 1, 1917.
X. Y., of Counsel.

A. B. Co.,
By C. D., Solicitor.

No. 1898.**Bond on Appeal in Equity or Admiralty or Bankruptcy.(1)**

Know all men by these presents, that we, A. B., as principal, and S. R. and L. P., as sureties, are held and firmly bound unto C. D. in the full and just sum of — (\$—) dollars, to be paid to the said C. D., his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of — in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a District Court of the United States for the — District of — in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a decree was rendered against the said A. B., and the said A. B. having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said C. D., citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the — Circuit, to be holden at the city of —, in said circuit, on the — day of — next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

L. S.

G. S.

A. B. [*Seal.*]

S. R. [*Seal.*]

L. P. [*Seal.*]

Approved by

H. S.,

U. S. District Judge.

(1) The bond on appeal from a District Court to a Circuit Court of Appeals may be allowed by the district judge. R. S. Sec. 999.

An appeal to operate as a supersedeas must be filed in accordance with R. S. Sec. 1007. *Adams v. Law*, 16 How. 148; *Kitchen v. Randolph*, 93 U. S. 86.

A trustee in bankruptcy is not required to give bond on appeal or error. Sec. 25c of the Bankruptcy Law of 1898, 30 Stat. L. 544.

No. 1899.

Bond on Appeal Superseding an Injunction.(1)

Know all men by these presents, that we, the C. D. Company of —, a corporation organized under the laws of —, and having its principal office at —, as principal, and S. R. and G. R., both of the city of —, in the county of —, state of —, as sureties, are held and firmly bound unto the above-named A. B. Company, in the sum of \$—, to be paid to the said A. B. Company, and for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of —, 1903.

Whereas, the above-named C. D. Company has prosecuted an appeal to the United States Circuit Court of Appeals for the — circuit, to reverse the decree for an injunction granted in the above-entitled suit in the District Court of the United States for the — district of —, in equity, on the — day of —.

Now, therefore, the condition of this obligation is such that if the above-named C. D. Company shall prosecute its said appeal to effect and answer all damages and costs if it fail to make such appeal good, and shall pay all damages and profits which may result from its manufacture and sale of its sweepers, the manufacture and sale of which are by the said injunction enjoined, from and after the date hereof until the final decision of the said District Court of Appeals thereon:

then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. But it is understood that this bond shall not be considered as securing the payment of any damages or profits which may have resulted from the manufacture and sale of infringing sweepers prior to the date hereof.

THE C. D. COMPANY,
By C. D., President.

(*Seal of the C. D. Company.*)

S. R.,
G. R.

The foregoing bond is hereby approved to operate as a supersedeas as to said injunction.

H. F.,
District Judge.

(1) An appeal may be taken within thirty days from the entry of an order granting an injunction. See Judicial Code, Sec. 129.

An appeal with supersedeas does not suspend the effect of an injunction pending an appeal. *Knox County v. Harshman*, 132 U. S. 14; Sec. 7 of the Act of March 3, 1891, as amended June 6, 1900, 31 Stat. L. 660; *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888; *Crown Cork and Seal Co. v. Standard Stopper Co.*, 136 Fed. 184, 69 C. C. A. 200.

The granting of a stay of the operation of an injunction during the pendency of an appeal is discretionary. In *re Haberman Mfg. Co.*, 147 U. S. 525. It may be ordered by the trial court or by the appellate court or a judge thereof during the pendency of such an appeal, and a new bond in addition to the appeal bond may be required. See Judicial Code, Sec. 129, and Equity Rule 74.

The practice in superseding an injunction on appeal under Sec. 129 of the Judicial Code, is usually to apply to the court below at the time the appeal is allowed. If the judge grants the stay a clause may be inserted in the order allowing the appeal or endorsed on the bond at the time he approves it substantially as in the form of bond above. The application for the allowance of the appeal and the stay of injunction may be made to the Appellate Court or a judge thereof who may grant the same relief in the same way. The application may be made to the Appellate Court after the appeal has been taken. The application may be made by motion or petition.

The court or judge must be satisfied that justice requires a stay of the injunction pending the appeal. In some cases no showing is necessary other than a reference to the record. In other cases the court may require affidavits or oral testimony.

An appeal from a motion granting a preliminary injunction does not effect removal of the cause to the Circuit Court of Appeals. Foote v. Parsons Non-Skid Co., 196 Fed. 951, 118 C. C. A. 105.

No. 1900.

**Petition to Circuit Court of Appeals to Stay Injunction
Pending Appeal.(1)**

The United States Circuit Court of Appeals for the ———
Circuit.

C. D., Appellant,

vs.

A. B., Appellee.

Now comes the appellant and represents to the court that an interlocutory decree was made on the ——— day of ———, in the case of A. B. vs. C. D., pending in the District Court of the United States for the ——— district of ———, awarding an injunction to enjoin the defendant, C. D. [*as may be*], and the said C. D. duly prosecuted his appeal therefrom to this honorable court as authorized by section 129 of the Judicial Code, and has given a supersedeas bond in the penal sum of \$——, as will more fully appear from the record in this cause filed in the office of the clerk of this court.

, The appellant further represents that if the injunctional decree in said cause stands in full force and effect until said appeal is heard and decided by this court, the said appellant will suffer great and irreparable injury, as will more fully appear from the affidavits attached to this petition and which are hereby made a part hereof.

Wherefore, said appellant prays this honorable court to order this appeal and bond, or such further bond as the court may direct, to operate as a supersedeas to stay and suspend the operation and effect of such decree or order and the said injunction pending this appeal and for such other and further relief as to the court may seem meet.

C. D.

(1) See note to No. 1899.

No. 1901.**Order of a Circuit Court of Appeals Suspending
Injunction.(1)**

The United States Circuit Court of Appeals for the —
Circuit.

C. D., Appellant,

vs.

A. B., Appellee.

It appearing to the court that C. D. has prosecuted an appeal to this court to reverse the decree for an injunction granted in the suit of A. B. vs. C. D., in the District Court of the United States for the — District of —, in equity, on the — day of —, and has filed a bond in the penal sum of — thousand dollars, with the usual conditions of a supersedeas bond, it is therefore ordered that the said appeal and bond operate as a supersedeas and that the operation and effect of the order so appealed from and the injunction granted in pursuance thereof be stayed and suspended until said appeal is heard and decided by this court.

It is further ordered that said appeal be heard on the — day of — unless the appellee shall desire a hearing at a later date or unless the court for good cause shown shall postpone such hearing. It is further ordered that a certified copy of this order be sent by the clerk of this court to the clerk of the court below forthwith.

(1) See note to No. 1899.

No. 1902.**Citation on Appeal.**

[*Caption.*]

The President of the United States to the above named Complainants, —, —, and all others similarly situated, and to —, their attorney, Greeting:—

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State

of California, within thirty days from the date of this writ, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein —, —, are complainants and —, —, are defendants, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable A. B., Judge of the United States District Court for the District of Idaho. Southern Division, this the — day of —.

A. B.,
Judge.

Service of the within citation and receipt of copy thereof admitted this the — day of —.

X. T.,
Attorney and Solicitor for Appellees.

No. 1903.

Citation on Appeal in Bankruptcy.

The United States Circuit Court of Appeals, for the — District.

The United States of America, — Judicial Circuit, ss.
To The D. M. Grocery Company—Greeting:—

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the — Circuit, to be holden at the city of Cincinnati, in said district, on the — day of — next, pursuant to a petition on appeal and assignment of error filed in the clerk's office of the District Court of the United States for the — District of —, — Division, in the matter of F. H., doing business as F. H. & Son, to show cause, if any there be, why the judgment rendered in said cause reversing the finding and order of the referee in bankruptcy disallowing and expunging the claim of the D. M. Grocery Company and ordering the allowance of said claim, as proved by it, before said referee, in the sum of \$—, as in said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. C., Judge of said District Court, this
 — day of — in the year of our Lord —, and of the
 independence of the United States of America the one hun-
 dred and —.

A. C.,

United States District Judge.

No. 1904.

Assignment of Errors on Appeal.(1)

The District Court of the United States,
 for the — District of —.

A. B. } In Equity.
 vs. } No. —.
 C. D. } Assignment of Error.

And now, on the — day of —, came the said plain-
 tiff, by X. & X., his solicitors, and says that the decree in said
 cause is erroneous and against the just rights of said plaintiff,
 for the following reasons:

First. Because the evidence showed that the mortgages in
 question were given to hinder, delay, and defraud the creditors
 of the P. F. Company.

Second. Because the evidence showed that the said mort-
 gages amounted to and were in fact an assignment for the
 benefit of creditors, and were invalid so far as they undertook
 to make preferences.

Third. Because the evidence showed that the said mort-
 gages amounted to and were in fact an assignment for the
 benefit of creditors, and were invalid, because they provided
 for returning the surplus to the mortgagor before all its debts
 were paid.

Fourth. Because the evidence showed that the said mort-
 gages were preferential securities, given by the directors and
 managers of an insolvent corporation to secure debts on which
 they were personally liable, in violation of their fiduciary duty
 in the premises.

Wherefore the said plaintiffs pray that the said decree be
 reversed, and that the said court may be directed to enter a
 decree in accordance with the prayer of the bill.

X. & X.,

Solicitors for Plaintiffs.

(1) An assignment of errors must be filed in the District Court before the appeal is granted and should set out separately and distinctly each error asserted and intended to be urged. Rule 11, C. C. A.

Assignments of errors are as necessary in appeals as in writs of error. *Randolph vs. Allen*, 73 Fed. Rep. 23, 19 C. C. A. 355; *Dufour vs. Lang*, 4 C. C. A. 663, 54 Fed. Rep. 913.

If an assignment of errors is not in accordance with Rule 11 the appeal may be dismissed. *Dufour vs. Lang*, 54 Fed. Rep. 913, 4 C. C. A. 663.

The court will not consider on appeal questions not raised before the lower court and not mentioned in the assignment of errors. *3rd Nat'l Bank vs. Nat'l Bank*, 30 C. C. A. 436, 86 Fed. Rep. 852.

It has been held that in admiralty a Circuit Court of Appeals may permit the filing therein of additional assignments of error to cover points not specifically included in the original assignment. *Cory vs. Penco*, 76 Fed. Rep. 997, 22 C. C. A. 675.

As to the particularity with which each error should be assigned see *Andrews vs. Pipe Wks.*, 76 Fed. Rep. 166, 22 C. C. A. 110; *Central Trust Co. vs. Continental Trust Co.*, 30 C. C. A. 235, 86 Fed. Rep. 517.

No. 1905.

Assignment of Errors to Decree on Demurrer for Defendant in Trade Mark Case.

[Caption.]

And now comes the complainant and says that in the record and proceedings of the said court in the above entitled cause and in the final decree made and entered therein on the — day of —, there is manifest error and for error the said complainant assigns the following:

First. The court erred in that it did not hold that by the admissions of the demurrer the numbers in the bill of complaint referred to were trade marks of the complainant and entitled to be protected as such and that the use by the defendant of the numbers by it availed of was a violation and infringement of complainant's rights.

Second. The court erred in that it did not hold that by the admissions of the demurrer the numbers in the bill of complaint referred to were means whereby complainant's goods were known and identified and that the use by the defendant

of the numbers by it availed of was calculated to mislead the public and was inequitable and should be enjoined.

Third. The court erred in that it did not hold that by the admissions of the demurrer the complainant was equitably entitled to be protected in the exclusive use of the numbers referred to in the bill of complaint as having been by it used and that the use by the defendant of the numbers referred to in the bill of complaint as having been by it, the defendant, used, was calculated to mislead the public, was inequitable and constituted a violation and infringement of complainant's rights.

Fourth. The court erred in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file its answer or plea.

Fifth. The court erred in sustaining the demurrer and directing that the bill of complaint be amended or dismissed.

Wherefore the complainant prays that the said decree be reversed.

R. X.,

Solicitor for Complainant.

No. 1906.

Assignment of Errors by Plaintiff in Patent Suit to Decree Holding Patent Invalid (1).

The A. B. Co.,

vs.

The C. D. Co.

It is respectfully submitted:

First. That the court erred in holding that complainant's patent was without novelty.

Second. That the court erred in holding that complainant's patent was void for want of invention.

Third. That the court erred in refusing to grant the relief as prayed for in complainant's bill.

Wherefore complainant prays that the said decision be

reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the bill of complaint.

X. & X.,

Solicitors for Complainant.

(1) Taken from the record in Stillwell-Bierce & Smith-Vaile Co. vs. Eufaula Cotton Oil Co., 117 Fed. Rep. 410.

No. 1907.

Assignment of Errors by Defendant to a Decree Sustaining Validity of Patent.

The District Court of the United States

— District of —, — Division.

| | |
|--------------------|--------------|
| The C. D. Mfg. Co. | } No. —. |
| <i>vs.</i> | |
| A. B. | |
| | } In Equity. |

It is respectfully submitted:

First. That the court erred in holding that the claim of the patent in suit was good and valid.

Second. That the court erred in holding that the defendant's device infringed said claim.

Third. That the court erred in not dismissing the bill of complaint.

Wherefore the defendant prays that the decree may be reversed and that said court may be directed to dismiss the bill of complaint herein.

Y. & Y.,

Solicitors for Defendants.

No. 1908.**Assignment of Errors to a Decree in Patent Suit Sustaining
Validity of Patent and Granting an Injunction.**

The District Court of the United States

For the ——— District of ———.

The A. B. Company, Limited, Complainant,

vs.

The C. D. Company, Defendant.

} In Equity.

Now comes the said defendant, by its solicitor, and says that in the interlocutory decree heretofore rendered in this cause on the ——— day of ———, the court erred in the following particulars:

First. That the court erred in holding that letters patent No. 318,533, to Julius Berkey, mentioned in the bill of complaint in this cause, are good, sufficient and valid in law.

Second. That the court erred in holding that the said Julius Berkey was the first, original and sole inventor of the improvements described and claimed therein.

Third. That the court erred in holding that the defendant has infringed upon the said letters patent and upon the exclusive rights of the plaintiff, as assignee of the said letters patent, by making, using and selling casters manufactured by and in conformity with said invention improvement, as charged in the bill of complaint.

Fourth. That the court erred in holding that letters patent No. 345,614, issued to Julius Berkey and William R. Fox, mentioned in the bill of complaint in this cause, are good, sufficient and valid in law.

Fifth. That the court erred in holding that the defendant was liable for, and directing the plaintiff to recover of and from it, the profits, gains and advantages which the defendant has received or made from the said infringement in making, using and selling said invention, and in making, using and selling casters manufactured according to said letters patent,

and each of them, within the said territory, and also the damages which the complainant has sustained thereby.

Sixth. That the court erred in appointing, as it does in the sixth paragraph of the said decree, a Special Master to take an accounting of the gains, profits and advantages which have accrued to the defendant and of the damages suffered by the complainant on account of said infringement.

Seventh. That the court erred in holding that a perpetual injunction be issued in this cause against the defendant, its officers, agents, servants and employes, enjoining and restraining them from making, using and selling any caster sockets embodying and containing any of the inventions or improvements described and claimed in letters patent No. 318,533 or embodying and containing the inventions or improvements described and claimed in claims Number three (3), four (4), five (5) and six (6) of letters patent No. 345,613, to Berkey and Fox.

Eighth. That the court erred in holding that the complainant was entitled to recover any costs herein from the defendant.

Wherefore the defendant prays that said decree be reversed.

The C. D. Co.,
By R. Y., Its Solicitor.

No. 1909.

Assignment of Errors to a Decree Holding Patent not Infringed.

The District Court of the United States,
For the ——— District of ———.

| | |
|-------------------------------|--------------|
| A. B., Complainant, | } In Equity. |
| vs. | |
| The C. D. Company, Defendant. | |

And now comes the said complainant, by Messrs. X. & X.,

its solicitors, and says that in the record and proceedings and decree in this cause there is manifest error in this, to wit:

First. The court erred in holding and deciding that the Diss patent sued upon is not infringed by the structure of the said defendant.

Second. The court erred in holding and deciding that the Crean & Stone patent sued upon is not infringed by the structure of said defendant.

Third. The court erred in granting a decree for said defendant, whereas, said decree should have adjudged that said defendant had infringed the letters patent mentioned in said bill of complaint.

Wherefore the complainant prays that the said decree be reversed.

X. & X.,

Solicitors for Complainant.

No. 1910.

Assignment of Errors by a Defendant to a Decree in a Patent Suit Granting a Preliminary Injunction.

District Court of the United States,
Western District of Michigan.

| | |
|---------------------------------|--------------|
| The A. B. Company, Complainant, | } In Equity. |
| vs. | |
| The C. D. Company, Defendant. | |

And now comes the defendant, the C. D. Company, by Y. & Y., its solicitors, and having prayed an appeal to the United States Circuit Court of Appeals for the — Circuit from the interlocutory decree of said District Court entered on the — day of —, granting an injunction pursuant to the prayer of the bill of complaint in this cause, respectfully represents, as grounds of appeal and as an assignment of errors herein, that said District Court erred in the following particulars:

First. In holding the first, second, third and sixth claims of letters patent of the United States, No. 557,868, issued to F. R. Packham, April 7, 1896, for an improvement in furrow-opener for seeding machines, to be good and valid in law and capable of being enforced in a court of equity.

Second. In not holding said claims of said Packham patent to be void for want of novelty or patentable subject matter.

Third. In holding that this defendant has infringed the first, second, third and sixth claims of said Packham patent, or any of them, and in ordering an injunction accordingly.

Fourth. In not holding that this defendant has not infringed the first, second, third and sixth claims of said Packham patent, or any of them, and in not refusing to grant an injunction accordingly.

Fifth. In entering any decree or ordering any injunction in the complainant's favor pursuant to the prayer of the bill of complaint herein.

Sixth. In not entering a decree in this defendant's favor and in not dismissing said bill of complaint.

Wherefore the defendant prays that the said decree be reversed.

Y. & Y.,

Solicitors for Defendant.

No. 1911.**Assignment of Errors to Decree Dismissing Bill Charging
Contributory Infringement (1).***[Caption.]*

Now comes the complainant in the above entitled cause and files with its above petition for appeal its assignment of errors.

First. The court erred in holding that a patentee has not the exclusive control over his patented invention during the term of his patent.

Second. The court erred in refusing to hold that a patentee has the exclusive right of manufacture, sale, and use, of his patented invention during the term of his patent.

Third. The court erred in holding that the restriction which the complainant imposes upon the use of its patented button fastening machines, as the same is set forth in the bill of complaint, is contrary to public policy, and not enforceable in a court of equity.

Fourth. The court erred in holding that the bill of complaint states no cause for relief in a court of equity.

Fifth. The court erred in sustaining the demurrer and dismissing the bill.

Wherefore the complainant prays that the decree of the said District Court of the United States may be corrected and reversed.

R. X.,

Attorney for Complainant.

(1) Taken from the record in *Heaton Peninsular Button-Fastener Company v. Eureka Specialty Co., James W. Du Mont and Charles Livingstone*, 25 C. C. A. 267, 77 Fed. 288.

No. 1912.**Assignments of Errors to a Decree for an Injunction.**

The District Court of the United States

For the — District of —.

Telephone Company

vs.

People's Telephone Company and J. C., Manager.

} In Equity.

And now on this the — day of —, came the above named defendants, the People's Telephone Company and J. C., manager, and say that the interlocutory order or decree made and entered herein on the — day of —, granting the injunction prayed in the bill, is erroneous and against the just rights of said defendants, for the following reasons:

First. Because, as appears from the record in this cause, complainant was not entitled to the injunction granted in said interlocutory order or decree, and its application for same should have been refused, and the restraining order theretofore granted therein should have been dissolved.

Second. Because, as it appears from the record in this cause, neither the defendants nor their agents, servants and attorneys, had, prior to the said order or decree, made any connections whatsoever by wires, switches, instruments or any other devices of any kind or character with the property of complainant, nor were intending so to do.

Third. Because, the court erred in holding that the complainant was entitled to an injunction restraining the defendants, their agents, servants and attorneys, from furnishing materials for making connection by wires with the property of complainant, or advising, showing or directing any other parties how to make same, and from furnishing for use wires, instruments or other devices connected, or to remain connected, with the property of complainant, and in granting a writ of injunction for the purposes aforesaid, the defendants being entitled, as a matter of law, to sell such material as it may de-

sire, to other parties desiring to make connections with the property of complainant, and furnishing to them such information as it may elect.

Fourth. Because the defendants, their agents, servants and attorneys, as it appears from the record, have not made any connection with the property of the complainant, and the only connections made with the complainant have been made and used by its own patrons, and the same have not in any way benefited the defendants, except in so far as they sold and furnished material for such purpose, and if the complainant has any remedy to prevent the making of connections with its instruments in the manner shown in the bill, when its own patrons desire so to do for their own convenience, its remedy is solely against its own patrons who are not parties to this suit, and it is not entitled to any relief whatsoever against these defendants, or to any injunction whatsoever in the premises.

Fifth. Because the complainant is not entitled to an injunction inhibiting the defendants from selling switches, wires and telephone equipment—property sold in all the markets of the country—to complainant's patrons, simply because the said defendants and complainant's patrons are forbidden by complainant from using or attaching same to complainant's 'phones and wires, and the court erred in granting such injunction.

Sixth. Because the court has no power to enjoin the defendants from giving or furnishing information or directions to third parties touching the manner in which connections can be made between two telephone lines through a desk 'phone, as said information and direction is such as any ordinary electrical mechanic can give, and the court erred in enjoining defendants from giving such information and direction.

Seventh. Because, as appears from the record, no injury accrued or could accrue, to complainant by reason of the acts complained of, and shown to have been done by defendants, and the court erred in granting said injunction.

Eighth. Because complainant's bill and the record generally

show that complainant's real cause of complaint, if any it has, is against its own patrons for attaching by switches, wires, etc., its telephones and wires with those of the defendant company, and yet complainant has not made any of its patrons, thus shown or alleged to be the principal offenders, parties to the suit, and therefore there is a want of necessary and proper parties defendant, and complainant wholly fails to show any reason for not making said patrons parties defendant.

Wherefore, the said defendants pray that the said interlocutory order or decree be reversed, and that said District Court of the United States for the — District of —, may be directed to enter a decree dissolving and vacating the injunction granted by it under said interlocutory order or decree, and the restraining order preliminary thereto.

People's Telephone Company,
J. C., Manager.
By Y. & Y., Solicitors.

No. 1913.

Assignment of Errors by Intervening Petitioners.

The District Court of the United States

For the — District of —.

The A. B. Trust Company, Complainant,

vs.

The C. D. Railroad Company *et al.*, Defendants.

} In Equity.

Assignment of Error by The R. S. Stave Company and the S. T. Insurance Company.

Now come the intervening petitioners, The R. S. Stave Company and The S. T. Insurance Company, and having asked for an allowance of an appeal from the decree herein against them dismissing their intervening petition, assign for errors in said decree and the proceedings of court therein the following:

First. That the court erred in finding and decreeing that the

intervening petition of the R. S. Stave Company and The S. T. Insurance Company should be dismissed.

Second. That the court erred in not finding and decreeing for the said intervening petitioners on the Master's report.

Third. That the court erred in finding the law against these intervening petitioners.

• *Fourth.* That on the facts found in the Master's report these intervening petitioners are entitled to a finding and decree in their favor; whereas, the court found as a matter of law against them.

Fifth. That the finding and decree of the court are against the law and equity of the case and against the finding of facts contained in the Master's report and contrary to the same.

Wherefore, these intervening petitioners pray that the finding and decree of the court against them be reversed, and that the court may be directed and ordered to enter a decree on the Master's report in accordance with the prayer of their intervening petition filed in this action.

Clayton W. Everett,

Solicitor for Intervening Petitioners, The R. S. Stave Company and The R. T. Insurance Company.

No. 1914.

**Assignment of Errors (Bill for Specific Performance
Dismissed).**

[Caption.]

A. B., the above named complainant and appellant, hereby assigns errors on the decree of the District Court of the United States for the — District of —, — Division, in the above entitled cause, dated the — day of —, in the following particulars:

First. Because said court erred in the ruling made by it that the contract dated —, between C. M. and A. W., now deceased, was an unilateral contract.

Second. Because said court erred in its ruling that the testimony of said C. M., was prohibited by the statutes of the United States relating to the testimony equally within the knowledge of a deceased person.

Third. Because said court erred in ruling that the statute of the state of — applied to said testimony and that the statute of the United States did not control the admission of said testimony.

Fourth. Because said court erred in holding that said C. M. was a party within the meaning of section 858 of the Revised Statutes of the United States.

Fifth. Because said court erred in ruling that the testimony in this case showed such important changes in the property after the contract of September 12th, —, was made, that the court in the exercise of sound discretion ought not to decree specific performance.

Sixth. Because the court erred in dismissing said bill instead of decreeing specific performance to said contract as prayed for by complainant.

Wherefore the complainant prays that the said decree be reversed.

R. X.,
Solicitor for Complainant and of Counsel.

No. 1915.

Assignment of Errors in Tax Case.(1)

[Caption.]

The plaintiff makes the following assignment of errors which he avers occurred in the trial of this cause, and prays for reversal of the decree of the District Court and for a decree and judgment as prayed for by it in its original bill.

First. The court erred in holding that it was immaterial whether the action of the State Board of Equalization for

banks in increasing the valuation of complainant's shares was invalid for want of notice to the bank or its shareholders of the time said board would consider the question of the sufficiency of the auditor's valuation and affording them an opportunity for a hearing.

Second. The court erred in holding and deciding that other banks in the state were not taxed at less than sixty per centum (60 per cent.) of the actual market value of their shares, and if they were not so taxed, then there was no ground for claiming that there was any discrimination in the action of the State Board of Equalization for banks in assessing the value of the shares of the plaintiff, and that in view of such fact, it became unnecessary to decide whether or not the notice of the action of the State Board was sufficient.

Third. The court erred in holding that if the tax assessed against the shareholders of the bank is no greater than ought to have been assessed under the law, then the plaintiff is entitled to no relief whether the State Board had jurisdiction to increase the auditor's valuation or not.

Fourth. The court erred in failing and refusing to decide that the action of the State Board of Equalization for banks in increasing the valuation of the auditor was void for want of jurisdiction to act at the time the board took the action complained of, and in refusing to enjoin the tax levied and assessed on the amount so added to the valuation of the auditor by the State Board of Equalization.

Fifth. The court erred in holding and deciding that the former adjudications between the complainant and treasurer of — county in 1887, 1893 and 1894, shown by the record thereof put in evidence was not conclusive of the right of the shareholders of the plaintiff to deduct their *bona fide* indebtedness from the value of their shares in fixing the value of the latter for taxation.

Sixth. The court erred in holding that in the former cases it was necessary to rely not only on the statutes of — and of

the United States, but on the practical operation of the laws of — in exempting moneyed capital in the hands of individual citizens of the state on taxation — that it was necessary to show the practical operation of the law was such as to show a material discrimination.

Seventh. The court erred in holding that the former adjudications relied on were of fact, and not of law, and of the fact of the practical operation of the law in 1887, 1893 and 1894.

Eighth. The court erred in overruling the exceptions of the complainant to the Master's report, and in refusing judgment for the complainant on the ground that the former adjudications were conclusive of its right thereto.

R. X.,

Solicitor for Plaintiff.

(1) Taken from record in *Mercantile National Bank vs. Hubbard*, 105 Fed. Rep. 809, 45 C. C. A. 66.

No. 1916.

Assignment of Errors in Tax Case.

[Caption.]

The American National Bank, complainant, in the above entitled cause says that the court in discharging the restraining order herein and denying the preliminary injunction prayed for, erred in the following respects, to wit:

First. The court erred in holding that the statutes referred to in the opinion of the court as sections 4274 and 4275 of the Kentucky Statutes have been repealed either by the constitution of 1891 or by the Act of November 11th, 1892.

Second. The court erred in holding that the method of procedure described by the laws of Kentucky to ascertain the value of one class of property is equally applicable to all property with only minor differences.

Third. The court erred in holding that the proof of complainant does not make out a case of clear and hostile discrimination against complainant and those of the class to which it be-

longs, such as would justify an injunction at the present state of the case.

Fourth. The court erred in holding that the tax herein complained of is a tax upon the capital stock of complainant equivalent to the value of all the shares of such capital stock, and in holding that it is not a tax upon the assets or property of the complainant.

Fifth. The court erred in holding that if it is a tax upon the capital stock of the complainant equivalent to the value of all the share of such capital stock, then the tax is a valid tax.

Sixth. The court erred in discharging the restraining order allowed herein in denying the injunction prayed for.

Seventh. The court should have granted the injunction against the collection of the taxes sought to be enjoined herein on the ground that they are not uniform with the taxes upon all other property subject to taxation, within the territorial limits of the author by levying the tax and on the further ground that the payment of such taxes on complainant's property and the property of other corporations similarly situated would be the payment of a higher rate of taxation than is required to be paid by individual property. And the court erred in declining to so hold.

Eighth. The court should at least have enjoined the assessment or taxation of the property or franchise of complainant to the extent that its value is dependent upon or consists in obligations of the United States or of the state of Kentucky, or any county, municipality, or other division thereof, or in the stock of other corporation, which stock is by the law of Kentucky exempt from taxation in the hands of stockholders, or in other non-taxable property. And the court erred in refusing to grant an injunction to the extent just indicated, or to any extent.

R. X.,

Attorney for Plaintiff.

No. 1917.**Assignment of Errors in a Suit Involving Trade Mark and Unfair Competition.**

The District Court of the United States

— District of —.

| | | |
|---------------------------------|---|---------------|
| The A. B. Company, Complainant, | } | In Equity. |
| vs. | | Assignment of |
| The C. D. Company, Defendant. | | Errors. |

And now comes the said complainant, The A. B. Company, by Messrs. X. & X., its solicitors, and says that the interlocutory decree in said cause is erroneous and against the just rights of said complainant in the following particulars, to wit:

First. The court erred in finding that the words "Queen" and "Queen Quality," as originally adopted and now used by complainant in connection with ladies' shoes manufactured by it, are and were designed to designate character, class, grade and quality of said shoes

Second. The court erred in refusing to decree that complainant has, and at the time of the institution of this action, had a good and valid trade mark in the words "Queen Quality."

Third. The court erred in refusing to enjoin defendant from using the word "Queen" as a brand or mark for ladies' shoes sold by it, not of complainant's manufacture.

Fourth. The court erred in refusing to enjoin defendant from using said word "Queen" when printed not in colorable imitation of or resemblance to the mark of complainant in connection with ladies' shoes by it sold, not of complainant's manufacture.

Fifth. The court erred in permitting defendant to use said word "Queen," used in script in connection with ladies' shoes sold by it, not of complainant's manufacture, provided defendant should plainly and conspicuously indicate that the shoes so labeled or marked were not the same as the "Queen Quality"

shoes manufactured by complainant, and in refusing to enjoin such use.

Sixth. The findings and decree of the court as above complained of are contrary to the law of the land and the evidence in this case.

Wherefore, complainant prays that said findings above complained of may be reversed, and that said court may be directed to enter a decree in full accord with the prayer of its bill of complaint.

The A. B. Company,
By X. & X., its Solicitors.

No. 1918.

Assignment of Errors by Defendants in Trade Mark Case.

The District Court of the United States
— District of —.

| | | |
|--|---|------------|
| The A. B. Company, Complainant, | } | In Equity. |
| vs. | | |
| The C. D. Company, et al., Defendants. | | |

And now come said defendants, by Y. & Y., their solicitors, and, having prayed an appeal to the United States Circuit Court of Appeals for the — Circuit from the interlocutory order of said District Court, entered on the — day of —, granting a preliminary injunction pursuant to the prayer of the bill of complaint in this cause, respectfully represent, as grounds of appeal and as an assignment of errors herein, that said District Court erred in the following particulars:

First. In holding that the defendants have infringed the complainant's trade mark set forth in said bill of complaint or in any way violated the complainant's rights thereunder.

Second. In holding that the defendants have at any time or in any way been guilty of unfair or fraudulent competition in trade or have sought to divert the complainant's business by trading upon its reputation or otherwise.

Third. In sustaining the complainant's motion for a preliminary injunction and in granting such injunction.

Fourth. In not overruling the complainant's motion for a preliminary injunction and in not refusing to grant such injunction.

Wherefore the defendants pray that the said decree be reversed.

Y. & Y.,
Solicitors for Defendants.

No. 1919.

Assignment of Errors by the Plaintiff in a Foreclosure Suit.

| | |
|--|--|
| The A. B. Trust Company of the city of —, | Consolidated Cause. No. —. In Equity. |
| Trustee, Complainant, | |
| <i>vs.</i> | |
| The C. & D. Railroad Company, <i>et al.</i> , De- fendants. | |

In pursuance of the rules and practice of the United States Circuit Court of Appeals for the — Circuit and of the statutes in such case made and provided, the complainant, the A. B. Trust Company of the city of —, trustee, respectfully makes the following assignment of errors, in the above entitled cause to be relied upon by it, in its appeal from the decree made and entered in the above entitled cause on the — day of —, A. D. —.

First. The court erred in holding that the Second National Bank of — has a lien upon the real estate or any part thereof, described in paragraph XXIX of said decree.

Second. The court erred in holding said lien to be prior to the lien of the so-called general mortgage made by the defendant, The C. & D. Railroad Company to this complainant.

Third. The court erred in holding that any portion of the proceeds of sale therein ordered should be applied to the payment of said lien to said bank.

Fourth. The court erred in holding that said bank was entitled to interest from October 24, 1892, whereas, both the bank and E. H., trustee, had received interest up to May, 1897.

Fifth. The court erred in not sustaining the first exception taken by this complainant to that part of the report made in this cause by the Special Master under the order made the 8th day of July, 1899, relating to the claims of the defendants, E. H., The Second National Bank of —, *et al.*, "that upon the hearing of the evidence relating to said claims, said Master ruled out, rejected and failed to consider the entries in the cash book, journal and ledger of the Lake Construction Company, made part of his report as Exhibits 'A No. 1, A No. 2 and A No. 3, which tended to prove that the said E. H. had purchased the property on which the above named defendants claimed liens as trustee and agent for said The Lake Construction Company, acting as agent of the Short Line Railway Company and that said E. H. had been paid for said lands by said The Lake Construction Company, to which ruling exceptions were taken by complainant at the time."

Sixth. The court erred in not sustaining the second exception taken as aforesaid by this complainant, "that on said hearing said master further ruled out, rejected and failed to consider the entries in the journal and ledger of The Lake Construction Company made part of his report as Exhibits "BB 1," and "BB 2," which tended to prove a payment in full for said lands by said The Short Line Railway Company to said The Lake Construction Company, to which ruling exception was taken by the complainant at the time."

Seventh. The court erred in not sustaining the third exception taken as aforesaid by this complainant, "that on said hearing said master further ruled out, rejected and failed to consider the entries in the journal of The Short Line Railway Company, attached to his report as Exhibit "CC 1," which tended to prove a payment in full for said lands by said The Short Line Company to said The Lake Construction Company, to which ruling exception was taken by complainant at the time."

Eighth. The court erred in not sustaining the fourth exception taken as aforesaid by this complainant, "that on said hearing said master permitted said E. H. over the objection of complainant to contradict by his oral testimony the records or minutes written by said E. H. as secretary of the meeting of the directors of The Short Line Ry. Co., of July 28, 1893, which tended to prove that said E. H. had knowingly permitted and caused said The Short Line Ry. Co., of which he was a director, to pay said The Lake Construction Co., in full for said lands, and for that said master overruled complainant's motion to rule out said parol testimony contradicting said written records as aforesaid, and considered said evidence to which rulings complainant at the time excepted." The substance of which testimony was that the report and final settlement between the Lake Construction Company and The Short Line Railway Company and which showed payment in full for the real estate described in said paragraph 29 of said decree was thrown on the directors' table and was not examined and put through as a formal matter and said E. H. had no knowledge of matters therein, whereas the resolutions unanimously adopted by said directors of whom said E. H. was one and present, and by said E. H. as secretary recorded in the record book of said railway company, recited that the report of said Construction Company had been carefully examined and found to be correct.

Ninth. The court erred in not sustaining the fifth exception taken as aforesaid by this complainant, "that said master found in his report that the acts of said E. H. at said directors' meeting of July 28, 1893, proved 'that he looked to and expected the said company,' meaning said railway company, 'and its grantees or successors, to provide for and discharge all obligations in regard to the said real estate,' whereas the record of said meeting and all the evidence proved that said E. H. did not look to and expect said The Short Line Ry. Co. to provide for and discharge any obligations in regard to said real estate, but that said E. H. was paid in full for said real estate and so

regarded himself and held himself out to said Railway Company and said master should have so found."

Tenth. The court erred in not sustaining the sixth exception taken as aforesaid by this complainant, "that said master found 'that said E. H., as against said Lake Construction Company, its successors and mortgagees, is not estopped to assert said right to reimbursement for the cost of the land so held by him as trustee,' whereas said master should have found that said E. H. is estopped to assert said right of reimbursement for the land so held by him as trustee, not only against said The Lake Construction Company, but also against The Short Line Railway Company, its successors, assigns and mortgagees."

Eleventh. The court erred in not sustaining the seventh exception taken as aforesaid by this complainant, "that said master found that said E. H. holds legal title to all of said lands in trust," subject, however, to the equitable right and charge upon and against that part of the same which is described in the first of the said mortgage deeds of said Second National Bank, for so much of the amount of the original purchase price paid for the same by said E. H. as is represented by the original note of \$5,379.90, given by said E. H. to said bank, "whereas he should have found that said E. H. holds the legal title to all of said land in trust for the C. & D. Railroad Company, its successors and assigns, and that neither he nor said Second National Bank, nor any of the other defendants, have any equitable right, charge or lien on the said lands, or any part thereof."

Twelfth. The court erred in not sustaining the eighth exception taken as aforesaid by this complainant, "that said master found that said Second National Bank of —, is the owner in equity of said charge upon and against said part of said land described in their said first mortgage as aforesaid, whereas said master should have found that there was no charge upon said land, or part thereof, and that the first mortgage of said bank was insufficient to operate as an assignment of said charge. if there had been one."

Thirteenth. The court erred in not sustaining the ninth exception taken as aforesaid by this complainant, "that said master found 'said lien right of \$—— bears interest —— not only in favor of said E. H., but also in the hands of said Second National Bank and as against said land — at the rate of six per cent. per annum,' 'to be calculated from the time the said \$—— was first advanced by said E. H.,' whereas he should have found not only that said \$—— has been paid, but that even if not paid, both said Second National Bank and said E. H. have received the interest upon said sum up to the first day of May, 1897."

Fourteenth. The court erred in overruling so much of this complainant's eleventh exception taken as aforesaid, as referred and excepted to the finding of the master that the lien of the complainant is subject to the lien of said defendant, The Second National Bank of ——, against the land described in its answer herein and paragraph 29 of said decree.

Fifteenth. The court erred in holding the defendant, The Railroad Equipment Company, has the legal title to the rolling stock described in paragraph 40 of said decree.

Sixteenth. The court erred in holding that said rolling stock was not subject to the lien of any party in this cause including that of this complainant.

Seventeenth. The court erred in not holding that as shown by the evidence and under the contracts set out in the pleadings of The Railroad Equipment Company by which it claimed title to said property, said Equipment Company could have no more than a lien upon said property to secure an indebtedness for money loaned.

Eighteenth. The court erred in not holding the indebtedness secured by said contract to be legally paid in full to said Equipment Company and its predecessors in title.

Nineteenth. The court erred in holding that there is now due the said Equipment Company upon its lease warrants upon said rolling stock the sum of \$——, with interest, and in not holding said indebtedness to be fully paid.

Twentieth. The court erred in decreeing said sum to be paid from the proceeds of sale therein ordered to be made prior to the application of said proceeds to the payment of the interest and principal of the bonds secured by the so-called general mortgage from the defendant railroad company to this complainant.

Twenty-first. The court erred in not holding that said contracts under which the said Equipment Company claimed provided for usurious interest, and that upon a proper application of the payment already made to principal and interest at the rate of six per cent. per annum, the entire indebtedness secured by said contracts was fully paid.

Twenty-second. The court erred in not holding said contracts to be *ultra vires* of the — railroad companies who made the contracts and who are predecessors in title of said defendant, The E. & D. Railroad Company, and that said contracts are therefore void.

Twenty-third. The court erred in not holding that of said contracts under which the Equipment Company claims those made by its predecessor in title, The Railroad Equipment Company of Connecticut, are *ultra vires* of said last named corporation, and that they are therefore void.

Twenty-fourth. The court erred in not holding the liability of the defendant railroad company and its predecessors in title to said Equipment Company and its predecessors in title to be limited to the repayment of the amounts originally advanced by said equipment companies and interest at six per cent. per annum, and in not applying the payments already made to such liability.

Twenty-fifth. The court erred in granting said Equipment Company any relief before it had complied with section 2 of the act of the state of —, passed May 4, 1895, entitled, "An Act to regulate conditional rates and sales of personal property and to provide for filing instruments pertaining to the same with certain officers, and making a violation thereof a misdemeanor," and before, in compliance with said section, it had tendered or refunded to said defendant railroad company, or

the receiver in this cause, all sums of money paid under the contracts under which said Equipment Company claims, after deducting therefrom a reasonable compensation for the use of said rolling stock not to exceed fifty per cent. of the amount so paid.

Twenty-sixth. The court erred in holding that the mortgage of June 1, 1892, from S. G. and wife to the defendant, W. S., trustee, is a lien prior in right to the so-called general mortgage to this complainant upon the real estate described in paragraph XLVI of said decree of March 10, 1900.

Twenty-seventh. The court erred in ordering the application of any part of the proceeds of sale to the payment of said mortgage to W. S., trustee, prior to the application thereof, to the payment of the principal and interest of the said general mortgage to his complainant.

Twenty-eighth. The court erred in not holding the general mortgage to this complainant to be prior and superior to that to said Sinks, trustee, to the extent of the right, title and interest of the mortgage under two mortgages which were prior in time and superior to that to W. S., trustee, made on January 1, 1890, and April 1, 1891, by The E. F. Railway Company to The Metropolitan Trust Company of the city of —, trustee, to secure bonds issued to the amount of — and —, respectively, and each a lien on that part of the property of the defendant railroad company in this action which lies south of the fair grounds in — county, —, which right, title and interest of said mortgagee passed to this complainant under and by virtue of the terms of its general mortgage from said defendant railroad company, which acquired the same as assignee of the purchasers at the sale under proceedings brought in July, 1895, in the Court of Common Pleas of — county, —, to foreclose said two prior mortgages, and to which proceeding said W. S., trustee, was not a party.

Twenty-ninth. The court erred in not holding that no part of the proceeds of the sale should be applied to the payment of the indebtedness secured by the said mortgage to W. S., trustee,

unless the proceeds from that part of the defendant railroad company's property lying south of the fair grounds in — county, —, and covered by said two prior mortgages of 1890 and 1891, equaled the amount of the debt secured thereby, —, and interest and the costs of the foreclosure proceedings.

Wherefore, the said complainant, the Metropolitan Trust Company of the city of —, as trustee, prays that the said decree of the District Court of the United States for the — District of —, — Division, be reversed, and that such directions be given and decree made in respect to the matters herein referred to in favor of this complainant as prayed for in its dependent and ancillary bill, with costs to be taxed.

Metropolitan Trust Company of the city of —, Trustee.

By R. X., of Counsel.

No. 1920.

Assignment of Error to Decree Dismissing Bill Attacking Railroad Re-organization.(1)

The District Court of the United States, — Division of the
— District of —.

| | |
|-----------------------------|--------------|
| Railroad Equipment Company, | } No. —. |
| vs. | |
| Southern Railway, et al. | |
| | } In Equity. |

And now on this March 29, 1898, comes the complainant by R. X., its solicitor, and says that the decree in the said cause is erroneous, and against the just rights of this complainant for the following reasons:

First. Said District Court was without jurisdiction to hear and determine said cause.

On November 10, 1897, said District Court erroneously overruled complainants' motion to remand said cause to the Chancery Court of Knox County, Tennessee, because:

a. The record in said cause does not present a case remov-

able from the state court to the District Court of the United States under the statutes governing such cases.

b. The record in said cause does not present a separable controversy in contemplation of the acts authorizing the removal of causes.

c. The requisite diverse citizenship required as a condition precedent to the jurisdiction of said District Court under a petition for removal, does not exist.

Second. Said District Court erroneously dismissed complainants' bill upon demurrer by decree entered Feb. 10th, 1898.

a. Complainant being a judgment creditor of defendant, E. T., V. & G. Ry. Co., is entitled to reach such equity as was preserved to the shareholders of that company in its assets and estate.

b. The purchase of the Southern Railway (created by the reorganization committee expressly to acquire the property) for the bondholders and shareholders of the E. T., V. & G. Ry. Company was in fraud of the rights of the creditors of the latter company to the extent that the shareholders' equity in the old company was protected and preserved in the new company.

c. The plan of reorganization of the E. T., V. & G. Ry. Co., was a fraud in law so far as the same provided for the protection of shareholding interests in that company, by transferring same to the purchasing company created for that purpose, and the purchasing company to the extent of the value of the interests thus preserved to shareholders is a trustee, and bound in equity to account to creditors for such value.

d. Because the said reorganization committee named in the reorganization plan exhibited to said bill, became by the deposit of securities thereunder and by its purchase of the rights and assets of the Terminal Company a stockholder and the agents of stockholders of the E. T., V. & G. Ry. Co., and as such, purchased said property for the benefit *pro tanto* of the shareholders of the E. T., V. & G. Ry. Co. under the scheme embraced in said reorganization plan to transfer the same to

said Southern Railway Company, the mere incorporation of said plan, in order to distribute a part of the consideration so to be received for said railroad to the shareholders of said E. T., V. & G. Ry. Co., without paying or providing for the payment of its debts. And said Southern Railway Company received and took said E. T., V. & G. Ry. Co., and the assets of said Railway Company as a mere agency for such purpose and with full knowledge of the purpose which was a fraud on the general creditors of said E. T., V. & G. Ry. Co. and the title is *pro tanto* fraudulent and affected with a trust in favor of complainants to the extent of the value so divided among said shareholders.

e. Because under the plan of reorganization exhibited to said bill, said Southern Railway Company is such a successor to the E. T., V. & G. Ry. Company that it is responsible for the debts of the E. T., V. & G. Ry. Company existing and not paid at the time it acquired such property.

Wherefore complainant prays that said decree may be reversed, and that said court may be directed to enter a decree in accord with the prayer of the bill.

Railroad Equipment Company,
By R. X., Solicitor.

(1) Taken from the record in *R. R. Equipment Co. v. Southern Ry.*, 187 U. S. 653, 47 L. Ed. 350.

No. 1921.**Assignment of Errors in a Chinese Deportation Case.(1)**

The District Court of the United States for the — District
of —.

United States, Plaintiff,

vs.

Yee N'Goy, Defendant.

First. That the order and judgment of deportation made and entered herein by United States Commissioner E. H., on the — day of —, and affirmed by the District Court on the — day of —, was and is void for want of jurisdiction in said United States Commissioner.

Second. That there is no law authorizing procedure taken in the case before said United States Commissioner.

Third. That the evidence is insufficient to sustain the finding of said commissioner that the defendant was born in China and is a subject of the Empire of China.

Fourth. That the evidence shows that defendant was born in the United States and is a citizen thereof.

Fifth. That the evidence is insufficient to sustain the finding of said commissioner that the defendant is a laborer.

(1) See Forms Nos. 1888, 1889, 1890 and 1891 above.

No. 1922.**Assignment of Errors to an Adjudication of Bankruptcy.**

District Court of the United States, District of —.

In the matter of A. B. and C. B.

In Bankruptcy.

No. —.

And now on this the — day of —, came A. B. and C. B., by R. X., Esq., and T. B., their attorneys, and say that the

judgment in said cause adjudicating them involuntary bankrupts is erroneous and against their just right, in that it was adjudged that, (*here state the objection to ruling, as they were insolvent, or they had given a preference, or as may be*).

Wherefore the said A. B. and C. B. pray that the said judgment may be reversed and said petition in involuntary bankruptcy against them be dismissed.

R. X.,

T. B.,

Attorneys for A. B. and C. B.

No. 1923.

Assignment of Errors to an Adjudication of Bankruptcy.

The District Court of the United States, for the — District of —.

A. B. & C., *et al.*,
 vs.
 C. D. & Co. }

Your petitioner assigns the following as the errors upon which he will reply:

First. The court erred in failing to hold that the petitioners had estopped themselves from prosecuting their petition herein on account of the execution by the said C. D. & Company of the alleged deed of assignment.

Second. The court erred in adjudicating the firm of C. D. & Company bankrupt.

Third. The court erred in adjudicating the individual members of said firm, and especially your petitioner, bankrupt.

Wherefore, your petitioner prays that the court would allow an appeal herein from the said decree of —, and would approve a bond for the stay of all proceedings pending such appeal, and your petitioner will ever pray, etc.

D. G.,

X. & X.,

Attorneys for D. G.

No. 1924.**Assignment of Errors by a Trustee in Bankruptcy to the Allowance of a Claim.**

The District Court of the United States, for the — District of —.

In the Matter of L. W., doing business
as L. W. & Son, Bankrupt. { In Bankruptcy.

And now on the — day of —, comes the said B. Y., as trustee in bankruptcy of L. W., doing business as L. W. & Son, bankrupt, by R. X., Esq., his solicitor, and says that the decree in said cause is erroneous and against the just rights of said trustee in bankruptcy for the following reasons:

First. Because the evidence shown and set out in the agreed statement of facts certified by the referee to be correct shows that said The S. D. Grocery Company, received preferences which it did not surrender or offer to surrender at the time of or before proving its claim.

Second. Because the facts as set out in the agreed statement of facts and certified by the referee to be correct shows that said claimant, The S. D. Grocery Company, within four months next preceding the date when the petition in bankruptcy was filed, had received preferences in excess of further credits afterward given in good faith by it to said bankrupt debtor without security of any kind for property which became a part of the estate of said bankrupt debtor, and remained unpaid at the time of adjudication for bankruptcy herein, in the sum of \$—.

Third. Because the evidence showed that said claimant, The S. D. Grocery Company, should not be allowed to prove its claim until it had surrendered or offered to surrender the amount of the excess of preference it has received from said bankrupt within four months prior to the filing of the petition in bankruptcy, over the amount of subsequent credits extended

to said bankrupt, without security of any kind, by said claimant for property which became a part of the estate of said bankrupt.

Fourth. Because the evidence showed that the finding and order of the referee in bankruptcy disallowing and expunging the claim of said The S. D. Grocery Company was correct and legal.

Fifth. Because the finding, judgment and decree of this court reversing the action of the referee in disallowing said claim for \$—— without any refunder of preferring and expunging said claim and in allowing said claim for \$—— without any refunder of preference on the part of said claimant is erroneous and illegal.

Sixth. Because the evidence showed that within four months prior to the time of the filing of the petition in bankruptcy claimant received, at different times, within said period, payments of money from said bankrupt in excess of subsequent sales of merchandise to said bankrupt by said claimant without security of any kind therefor.

Wherefore, the said B. Y., trustee in bankruptcy of said L. W., doing business as L. W. & Son, bankrupt, pray that said order, judgment and decree reversing the action and ruling of the referee and allowing the claim of said The S. D. Grocery Company in the sum of \$——, be reversed and that the said court may be directed to enter a decree affirming the action ruling an order of the referee.

R. X.,

Solicitor for B. Y., Trustee in Bankruptcy of L. W., doing business as L. W. & Son.

No. 1925.**Assignment of Errors by a Creditor to Judgment Disallowing Claim.**

The District Court of the United States, for the — District of —.

| | | |
|---|---|------------------|
| In the matter of A. B. & Co., <i>et al.</i> , | } | In Bankruptcy. |
| <i>vs.</i> | | Assignment of |
| C. D. and Son, Defendants. | | Error on Appeal. |

And now, on the — day of —, came the said E. F. Company, a creditor of the above named defendants, C. D. and Son, by Messrs. X. & X., its solicitors, and says that the judgment and decree in said case is erroneous and against the just rights of said creditor of said defendants for the following reasons:

First. Because the evidence shows that the claim of said creditor of said above named defendants was a probable debt against the estate of the bankrupts.

Second. Because the evidence shows that the claim of said creditor of said above named defendants should have been allowed as a valid debt against the estate of the bankrupts.

Third. Because the evidence shows that the judgment and decree should have been in favor of this creditor of the said above named defendants and against the trustee of the above named defendant.

Wherefore, the said creditor of the above named defendant prays that said judgment and decree be reversed, and that the said court may be directed to enter a decree and judgment allowing said claim of said creditor as a probable debt against the estate of the bankrupts, in accordance with the prayer of the bill.

X. & X.,
Solicitors for said Creditor, The E. F. Company.

No. 1928.**Assignment of Errors to an Order Disallowing Claims in
Bankruptcy.**

The District Court of the United States for the ——— Division
of the ——— District of ———.

In re A. B. Hardware Company, }
Bankrupt. } No. ———.

In the matter of the petition of M. R., G. R., and W. R.,
partners as R. & R., for allowance of their claim for fees and
payment of the same, as expenses, or as preferred, out of the
assets of the bankrupt.

Assignment of errors by R. & R. in the above matter made
a part of their petition for appeal. The said appellants come,
and for error in the order and judgment of the court herein,
assign as follows:

First. The court erred in holding and adjudging that the
general assignment of the A. B. Hardware Company was a
fraud upon the Bankrupt Act.

Second. The court erred in holding and adjudging that the
services charged for by petitioners, rendered in preparing the
said assignment, and in the effort to uphold and execute the
same, can not and should not be paid out of the assets belong-
ing to the estate of the bankrupt.

Third. The court erred in holding and adjudging that there
was no lien under the status and laws of the state of ———,
on assets of the bankrupt, in favor of the said R. & R., for the
payment of their fees for the services set out in their petition,
at the time of the filing of the petition herein for adjudication
in involuntary bankruptcy, and at the time such adjudication
was made.

Fourth. The court erred in holding and adjudging that the
assets of the bankrupt came to the hands of the trustee upon the
adjudication of bankruptcy, and his appointment as such, free

and discharged of any lien in favor of petitioners for compensation for their said services, and in not holding that such assets were legally and equitably charged, with a lien for and the payment of the compensation due therefor, upon their receipt by the said trustee.

Fifth. The court erred in holding and adjudging that the referee in bankruptcy was in error in ruling that the fee of petitioners for preparing the general assignment was a probable debt against the estate of the bankrupt, and payable out of such estate, and in reversing the judgment of the referee as to the said matter.

Sixth. The court erred in dismissing the petition of petitioners, and in not granting them the relief they therein prayed for.

Wherefore the said R. & R. pray that the judgment of said District Court be reversed with directions to said court to allow their claim.

R. & R.

No. 1927.

Assignments of Error in Collision Case.

The District Court of the United States for the — District of —. In Admiralty.

The Lake Company, Libelant,

vs.

Str. "W." her engines, etc.,

and

The R. Transportation Company,

Cross-Libelant,

vs.

Str. "C." her engines, etc.

} Assignments
of Error.

Now comes the R. Transportation Company, the claimant of the above named steamer "W." and cross-libelant, by its proctors, R. Y. and S. Y., and says that in the record and proceed-

ings in said cause and in the final decree entered therein, there is manifest error in the following particulars:

First. The court erred in not finding that the "W," made the turn at the red umbrella buoy in the ordinary and usual way.

Second. The court erred in not finding that the "W," in accord with the signals exchanged, left a good and sufficient channel on her starboard hand in which the "C" should have navigated.

Third. The court erred in not finding that the place of collision was well to the Canadian side of the navigable channel.

Fourth. The court erred in not finding the "C" at fault for not timely directing her course to port in accordance with the passing signals exchanged.

Fifth. The court erred in not finding the "C" at fault for not timely checking, stopping and reversing.

Sixth. The court erred in not finding the "C" at fault she being a light boat, for carelessly approaching so closely to the course of the "W" when the latter vessel was just completing her turn at the red umbrella buoy, the "C's" watch being bound to know that the approaching boat was a loaded vessel and the locality such that her speed on the turn would be slow.

Seventh. The court erred in not finding the "C" at fault for not timely starboarding her helm but instead thereof waiting until the vessels were dangerously close and then projecting herself broadly under a hard-a-starboard wheel squarely across the bows of the "W."

Eighth. The court erred in giving as excusatory of the "C's" not taking timely measures to avoid the collision, the statement that she was bound for the American lock.

Ninth. The court erred in not finding that the vessels ran several minutes and some 800 feet after the collision before striking the channel bank.

Tenth. The court erred in not finding that the improper navigation of the Str. "C" was the sole cause of said collision.

Eleventh. The court erred in finding the Str. "W" in any way at fault for said collision.

Twelfth. The court erred in not dismissing the libel filed herein.

Thirteenth. The court erred in awarding to libelant any damages or costs against the Str. "W.'s" claimant and surety.

Fourteenth. The court erred in not awarding the cross-libelant its full damages.

Fifteenth. The court erred in not awarding the cross-libelant its full costs.

Wherefore appellant prays that the said decree may be reversed and the said libel dismissed and that a decree may be made and entered condemning the said Str. "C." to pay to cross-libelant, this appellant, the full damages suffered by or on account of the Str. "W.," with interest and costs, and for such other and further relief as may be proper in the premises.

R. Y.

S. Y.

Proctors for Appellant.

No. 1928.

Assignment of Errors by Cross Libellants on Appeal in Admiralty.

[*Caption in District Court.*]

And now comes the above named cross-libelant and says, that in the record and proceedings in this cause, and in the final decree therein, there is a manifest error in the following particulars:

First. The court erred in not finding the steamer "M." solely in fault for the collision for not keeping a proper and sufficient lookout, and that the failure to keep a proper and sufficient lookout was the cause of the collision.

Second. The court erred in not finding that the steamer

"M." was insufficiently manned and that by reason thereof, the collision occurred.

Third. The court erred in not finding that the officers in charge of the "M." were incompetent to manage said vessel and that the collision was occasioned thereby.

Fourth. The court erred in not finding that it was the duty of the "M." to have directed her course to starboard in accordance with her signal given to the "C.," and that the porting of her wheel would have avoided the collision.

Fifth. The court erred in not finding that the cause of the collision was the failure of the "M." to keep her course in accordance with the signals exchanged, while passing the steamer "C."

Sixth. The court erred in not finding under the facts in the case, that the cause of the collision was the leaving, by the wheelsman, of his post just prior to the collision, thereby necessitating the lookout to take the wheel and leaving the vessel without a lookout at the time the steamers were approaching.

Seventh. The court erred in not finding, under the proofs in this case, that the cause of the collision was the putting of the wheel of the "M." a-starboard immediately prior to the collision.

Eighth. The court erred in not finding the "M." solely at fault for suddenly and without cause changing her course to port just as the vessels were about to pass.

Ninth. The court erred in not finding the "M." solely at fault for not taking steps to straighten the "M." up immediately upon commencing to change her course toward the "C."

Tenth. The court erred in not finding the "M." solely at fault by reason of the reckless and careless steering of said vessel as shown by the proofs in said cause.

Eleventh. The court erred in not finding that the incompetent and reckless navigation of the "M." was the sole cause of the collision.

Twelfth. The court erred in not finding that the sheering of the "M." was not caused by suction.

Thirteenth. The court erred in not finding that the libelants had not shown the true cause of the "M." sheering.

Fourteenth. The court erred in not giving the cross-libelant a decree for its full damages.

Fifteenth. The court erred in disallowing the cross-libelant its full costs.

R. S.

Proctor for Cross-Libelants.

No. 1929.

Assignment of Errors by Libellant on Libel for Salvage.

[*Caption.*]

The above named A. B., says that in the record of this case and in the final decree entered therein, there is manifest error in the following among other particulars:

First. That the amount allowed to your libelant and appellant, to wit, — dollars (\$—), is grossly inadequate in law and under the facts of the case for the service rendered.

Second. That the award of — dollars (\$—), is contrary to the law and the evidence in the case and is wholly inadequate award.

Wherefore, said appellant prays that for the aforesaid errors found in the record of said cause and said decree, the same may be reversed and such judgment entered thereon as ought to have been rendered by the said District Court. R. X.,

Proctor for Libelant and Appellant.

No. 1930.**Assignment of Errors by Respondent to a Decree for Salvage.**

[*Caption.*]

Now comes the respondent and appellant and says that in the record and proceedings in this cause, and in the decree rendered herein, there is manifest error in the following, among other particulars:

First. That the said decree awarding salvage in the sum of — (\$—) dollars is excessive.

Second. That the decree is not supported by sufficient evidence, and is contrary to the law of the case.

Third. In that the court considered the adjustment allowing a certain sum to another steamer as an admission of the respondent, whereas the parties had stipulated the use of the adjustment only so far as it contained competent and relevant testimony, and the said allowance was not made by respondent, and in any case was irrelevant and incompetent.

Fourth. In that the question of a proper award in this case depends upon the particular facts of the case, and those facts do not warrant so large an award as made in and by said decree.

R. Y.,

Proctor for Respondent and Appellant.

No. 1931.**Assignment of Errors in Admiralty (Collision Case).**

[*Caption in District Court.*]

Now come said petitioner and appellants, the A. B. Transportation Company, and the S. Surety Company of —, and say that in the record and proceedings in the above cause, and in the final decree entered herein there is manifest error in this, that the District Court erred:

First. In finding that appellant's steamer, the W., was in any wise at fault for the collision with the propeller F.

Second. In failing to find and decree that the propeller F. was solely at fault for said collision.

Third. In failing to dismiss the claims of E. F., G. H., J. K. and L. M., as owners of the propeller F., and also trustees for the lost personal effects of her crew, and for the owners and underwriters on the cargo of the said loss.

Fourth. In failing to dismiss the claim of the Marine Insurance Company, limited, in its own right, as underwriter on the cargo of the propeller F., and as trustee for the other underwriters on said cargo.

Fifth. In entering its decree against the petitioner and appellant, the A. B. Transportation Company, and the S. Surety Company of —, its stipulator, in the sum of — dollars (\$—), with interest from the date of the decree until paid, or for any sum whatever.

Sixth. In decreeing one-half the cost of the litigation on question of fault against the said petitioner, and its said stipulator.

Seventh. In failing to grant the prayer of the said petitioner in its answer and its petition to be discharged of all liability for said collision.

R. X.,

Proctor for Appellant.

No. 1932.

Assignment of Errors in Admiralty Suit.

[Caption.]

Now comes the Great Lakes Towing Company, respondent and appellant, by Goulder, White and Garry, its Proctors, and says that in the record and proceedings in said cause and in the report of the Commissioner filed November 23, 1915, and in the final decree filed and entered herein on March 17, 1916, there is error in the following respects:

1. The commissioner erred in finding that the respondent's tugs, E. M. Pierce and Excelsior, or either of them, was in fault in respect to the stranding against the east arm of the breakwater of Lorain harbor in the riprap alongside the same.

2. The commissioner erred in finding that the respondent's tugs, E. M. Pierce and Excelsior, or, either of them, was in fault in respect to the said steamer Roberts colliding with and striking the end of the east pier marking the entrance to the river at the harbor at Lorain.

3. The commissioner erred in finding that the said steamer Percival Roberts, Jr., was not at fault in respect to the stranding and to the striking or collision.

4. The commissioner erred in finding that the tugs were negligent in proceeding down the river with the tow at the rate of speed which they did and in making no effort to stop while still within the piers.

5. The commissioner erred in finding that the tug Excelsior was negligent in stopping her engines and doing nothing from the time the Roberts' stern cleared the end of the pier until close to the breakwater.

6. The commissioner erred in finding that the tugs were negligent in the management of the tow from the time they were in the piers until the stranding at the breakwater.

7. The commissioner erred in finding that there was a lack of understanding between the tugs as to the manner of making the tow and a want of judgment in continuing it after the wind struck them.

8. The commissioner erred in finding that the collision of the Roberts with the pier head was due to the mismanagement of the tugs and in not advising the men on the Roberts as to the plan they had for getting into the river.

9. The commissioner erred in finding that the libellant was without fault. In finding that the Roberts and those aboard of her were not at fault in neglecting to observe and respond to the signal of the Excelsior when that tug was signalling for a line to be used for the purpose of holding

the tug's bow against the side of the steamer, and thus prevent the steamer from striking the east pier.

10. The commissioner erred in his finding of facts.

11. The commissioner erred in his conclusions of law applicable to the facts.

12. The commissioner erred in finding the tugs or either of them at fault.

13. The commissioner erred in finding for the libellant and against the respondent.

14. The District Court erred in approving and affirming the report and findings of the commissioner.

15. The District Court erred in not sustaining the exceptions of the respondent to the report and findings of the commissioner.

16. The District Court erred in entering a decree against the respondent, Great Lakes Towing Company, in favor of libellant, The American Ship Building Company, in the sum of \$7483.22, together with interest and costs or for any sum.

Wherefore, the respondent prays the court that the report of the commissioner be set aside and that a decree be entered dismissing the libel.

GREAT LAKES TOWING COMPANY,

By G., W. & G.,

Its Proctors.

No. 1933.

Assignment of Errors by Libellants in Admiralty for Personal Injury.(1)

[Caption.]

And now comes said appellant and says that in the record and proceedings in this cause, and in the final decree entered herein, there is manifest error in the following particulars:

First. The court erred in not finding that the steamer M. was in fault for not having a proper and sufficient lookout.

Second. The court erred in not finding that the officers and crew of said steamer M. were incompetent, negligent and inattentive to their duties.

Third. The court erred in not finding the steamer M. at fault for shaping her course and getting dangerously close to a vessel she was overtaking and passing without signalling her intention to do so.

Fourth. The court erred in not finding said steamer M. at fault for running at a dangerously high rate of speed in a crowded channel, when she was liable at any time to run down smaller vessels, and that at a time when her own smoke enveloped her in thick weather.

Fifth. The court erred in not finding the steamer M. at fault for not sounding any whistle, when so running in thick weather.

Sixth. The court erred in not finding the steamer M. at fault, in that she, being the overtaking vessel, did not keep out of the way of the vessel she was overtaking.

Seventh. The court erred in not finding the M. at fault for wrongfully continuing to go ahead at full speed when her so doing made the danger of collision imminent, and after those in charge of her saw the W. rounding to.

Eighth. The court erred in not finding the steamer M. at fault in that she did not signal the W. or attempt to have some understanding with her.

Ninth. The court erred in not finding the steamer M. at fault, for porting her helm and changing her course without giving any notice of her intention so to do, and thereby causing the collision.

Tenth. The court erred in not finding the steamer M. in fault, in that she did not stop and reverse when the danger of collision became imminent.

Eleventh. The court erred in not finding the steamer M. at fault for wrongfully running out of her course and into said W., at a time when said tug was a long distance across and beyond the first mentioned course of said steamer M.

Twelfth. The court erred in not finding that the collision was caused by the fault of the steamer M.

Thirteenth. The court erred in directing the entry of the decree dismissing said libel.

Fourteenth. The court erred in not directing a decree to be entered in favor of libelant.

Therefore appellants pray that said decree be reversed and a decree condemning said steamer M. to pay the damages to said appellants made and entered and for such other and further relief as may be proper in the premises. X. & X.,

Libelant's Proctors.

(1) Taken from the record in *Robinson vs. Detroit and Cleveland Steam Nav. Co.*, 73 Fed. Rep. 883, reversing the decree of the District Court.

No. 1934.

Assignment of Error on Appeal in Habeas Corpus.

| | | |
|--|---|----------------------|
| The United States Circuit Court of Appeals for the ——— Circuit, Term of ———, in the year of our Lord one thousand eight hundred and ninety-four. | } | Assignment of Error. |
|--|---|----------------------|

In re application of L. H., for writ of *habeas corpus*.

Afterwards, to wit, on the ——— day of ———, 1894, in this same term, before the honorable judges of the circuit court of appeals for the ——— circuit, in the city of ———, ———, come the United States of America, by their attorney, J. H., and say that in the record and proceedings aforesaid, there is manifest error in this, to wit:

The court erred in granting the application for the writ of *habeas corpus*.

The court erred in holding that "the application must be granted for the reason that the sentence was imprisonment at 'hard labor' for five years, and the act under which the prisoner was convicted and sentenced provides for imprisonment not more than fifteen years."

The court erred in holding that the sentence was void.

For othen errors appearing upon the record.

Whereas, by the law of the land, the said writ of habeas corpus should have been discharged, and the prisoner remanded to the ——— penitentiary to serve out his sentence.

And the United States pray that the order and judgment aforesaid may be reversed, annulled, and held for naught, and for such other relief as may be proper in the premises.

J. H.,

United States Attorney.

No. 1935.

**Appeal from Commissioner of Patents to District of Columbia
Court of Appeals Where Opposition to Trade Mark
Registration.(1)**

[Caption.]

To the Court of Appeals, District of Columbia:

Your petitioner, Thomas Potter Sons & Co., Inc., a corporation duly organized and existing under the laws of the State of Pennsylvania, respectfully submits:

That it is a manufacturer of linoleum and has built up a large and valuable reputation for the manufacture and sale thereof;

That there was published in the Official Gazette of the United States Patent Office under date of August 17, 1915, in volume 217, page 1032 thereof, a notice of the provisional allowance of the application for the registration of the words "Ringwalt's Linoleum" with an oblong figure between the words, as an alleged trade-mark for linoleum to the Ringwalt Linoleum Works of New Brunswick, New Jersey, the application for which had been filed May 29, 1915, Serial Number 86,999;

That within the time allowed by law Thomas Potter Sons & Co., Inc., filed a notice of opposition to the grant of this alleged trade-mark:

That thereafter, to-wit, on or about October 26, 1915, Ringwalt Linoleum Works filed a motion to dismiss said notice of opposition;

That thereafter, to-wit, on or about December 14, 1915, the Examiner of Interferences rendered a decision granting said motion, dismissing said opposition and adjudging that the applicant, Ringwalt Linoleum Works, was entitled to register the mark for which it had made application;

That thereafter pursuant to the statutes and rules of practice of the Patent Office in such case made and provided, Thomas Potter Sons & Co., Inc., appealed from the decision of the Examiner of Interferences to the Commissioner of Patents, the same coming on to be heard and having been submitted a decision was on or about February 16, 1916, rendered by the Commissioner of Patents adverse to your petitioner, and sustaining the decision of the Examiner of Interferences;

That thereafter, on or about March 8, 1916, your petitioner filed a motion to amend its notice of opposition;

That thereafter, on or about March 13, 1916, the Examiner of Interferences obtained jurisdiction from the commissioner to hear and determine your petitioner's right to amend said notice of opposition;

That thereafter, on or about March 15, 1916, the Examiner of Interferences rendered a decision refusing to permit your petitioner to amend paragraph 2 of its notice of opposition but permitting an amendment to paragraph 3 thereof;

That thereafter, on or about March 16, 1916, an appeal was taken by your petitioner from the decision of the Examiner of Interferences refusing to permit it to amend paragraph 2 of its notice of opposition;

That said appeal came on to be heard and having been argued and submitted a decision was on or about March 27, 1916, rendered by the commissioner adverse to your petitioner and sustaining the decision of the Examiner of Interferences;

That thereafter, on or about March 30, 1916, your petitioner pursuant to section 9 of the act of February 20, 1905, and section 9412 of the Revised Statutes, gave notice to the Commissioner of Patents of its appeal to this Honorable Court and filed with him in writing the reasons of appeal;

That the Commissioner of Patents has furnished your petitioner with a certified transcript of the record and proceedings relating to said opposition, which transcript is filed herewith and is to be deemed and taken as a part hereof;

Wherefore your petitioner prays that its said appeal may be heard upon and for the reasons assigned therefor to the commissioner, and that said appeal may be determined and the decision of the commissioner be revised and reversed, and that justice may be done in the premises.

THOMAS POTTER SONS & CO., INC.,

By R., S. & P.,

Its Attornys.

(1) 33 Stat. L. 727, Sec. 9 of Trade Mark Act of February 20, 1905; In re Standard Oil Co., 39 App. Cas. (D. C.) 491 (1913).

Taken from record in Potter v. Ringwalt Linoleum Works, 46 App. D. C. 69.

No. 1936.

**Petition on Appeal from the Commissioner of Patents to the
Court of Appeals of the District of Columbia in an
Interference Case.(1)**

[*Caption.*]

To the Court of Appeals of the District of Columbia:

Your petitioner, Charles T. Coe, of Kearny, County of Hudson, and State of New Jersey, respectfully represents:

That he is the original and first inventor of certain new and useful Improvements in Boiler Cleaners.

That on June 3, 1911, in the manner prescribed by law, he presented his application to the Patent Office, praying that a patent be issued to him for the said invention.

That thereafter, to-wit, on October 10, 1911, an interference proceeding was instituted and declared between his said application and a pending application of one Gideon P. Brown, filed December 9, 1910, for a similar invention.

That the subject matter of said interference as set forth in the official declaration was as follows:

Count 1. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, there being a vertical supply pipe to which said nozzles are suitably connected.

Count 2. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, there being a wall for enclosing said boiler having a vertical opening in the side thereof, and a vertical supply pipe disposed at said opening, suitably connected with said nozzles.

Count 3. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, and means for moving the said nozzles toward and away from the boiler.

Count 4. In a soot blower for water tube boilers having inclined tubes, a vertical header, a set of movable nozzles for said vertical header, arranged one above the other, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical header.

That thereafter, to-wit, October 20, 1914, the case having been submitted upon the preliminary statement and evidence presented by the parties thereto, the Examiner of Interferences rendered a decision awarding priority of invention to Gideon P. Brown.

That, pursuant to the statutes, and the rules of practice in the Patent Office in such case made and provided, Charles T. Coe appealed from the said adverse decision of the Examiner of Interferences to the Board of Examiners-in-Chief, and the case having been argued and submitted to said board, a decision was rendered by said board on January 25, 1915, affirming the decision of the Examiner of Interferences.

That thereafter, pursuant to said statutes and rules, Charles T. Coe appealed from the said adverse decision of the Board of Examiners-in-Chief to the Commissioner of Patents, and the same coming on to be heard and having been argued and submitted, a decision was, on June 29, 1915, rendered by the commissioner adverse to your petitioner, affirming the decision of the Board of Examiners-in-Chief and awarding priority of invention to the said Gideon P. Brown.

That on August 14, 1915, your petitioner, pursuant to sections 4912 and 4913, Rev. Stat., United States, gave notice to the Commissioner of Patents of his appeal to this Honorable Court from his decision awarding priority of invention to said Gideon P. Brown, as foresaid, and filed with him, in writing, the following reasons of appeal:

1. The Commissioner of Patents erred in awarding priority to the contestant Brown in view of the proven prior reduction to practice of the party Coe.

2. The Commissioner of Patents erred in narrowly construing the issues.

3. The invention is broadly new and the construction proven to have been made by Coe and reduced to practice by him at the Worthington Pump Company's works at Harrison, N. J., the latter part of 1909, represents an embodiment of the invention of all of the issues and the Commissioner

of Patents erred in not according Coe the benefit of this date as a reduction to practice of the invention of the issues.

4. The Commissioner of Patents erred in not holding and deciding that the outermost tubes of the boiler were not the "means for causing said nozzles to follow the direction of the tubes" (the remaining tubes).

5. The Commissioner of Patents erred in holding and deciding that there was no such device disclosed in the Coe reduction as would correspond to means for causing the nozzles to follow the direction of the tubes when power is applied.

6. The Commissioner of Patents erred in construing the claims as not to be readable on the construction wherein the "all inclusive means" would include a handle for operating the nozzle, a handle plus any guide irrespective of the location of the guide.

7. The Commissioner of Patents erred in failing to follow the practice as announced by this court in the case of Kirby v. Clements, decided May 28, 1915; Miel v. Young, 29 App. D. C. 481; Lindmark v. Hodgkins, 31 App. D. C. 612, and in view of the practice established by the court it was the commissioner's duty to "give to claims the broadest interpretation which they will reasonably support."

8. The Commissioner of Patents erred in not awarding priority to Coe in view of the facts of record.

That the Commissioner of Patents has furnished your petitioner a certified transcript of the record and proceedings relating to said interference case, which transcript is filed herewith and is to be deemed and taken as a part hereof.

Wherefore, your petitioner prays that his said appeal may be heard upon and for the reasons assigned therefor to the commissioner, as aforesaid, and that said appeal may be determined and the decision of the commissioner be revised and reversed, that justice may be done in the premises.(1)

C. & M.,
Attorneys.

COMMISSIONER'S CERTIFICATE.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Records of this Office of Certain Papers, including printed testimony as used before the Office, in the matter of Interference Number 33,832, Coe v. Brown, Subject-Matter: Boiler Cleaners: said Papers being the Record for the Court of Appeals of the District of Columbia.

Attached, hereto, is the Index of said Record.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 25th day of September, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and fortieth.

[Seal Patent Office, United States of America.]

J. T. NEWTON,
Acting Commissioner of Patents.

(1) See 27 Stat. L. 436, Act of February 9, 1893.

Taken from record in Coe v. Brown, 44 App. D. C. 455.

Transcript on appeal in equity and admiralty is provided for by R. S. U. S. Sec. 698, which requires that transcript and copies of the proofs, entries and papers on file, shall be transmitted to the Supreme Court.

This statute is also applicable to the Circuit Court of Appeals, by the provisions of the Act of March 3, 1891, 26 Stat. L. 826, Sec. 11.

See also, Act of February 13, 1911, 36 Stat. L. 901, being an act to diminish the expense of proceedings on appeal or error, or certiorari.

Judicial Code, Sec. 238, is based on Sec. 5 of Act of March 3, 1891, but made to include the District Courts of Hawaii and Porto Rico.

Note that the Code section has never included the provisions of Sec. 5 relative to crimes or the jurisdiction of the Supreme Court respecting state courts, and citations of old Sec. 5 of the Act of 1891 must be viewed with these omissions in mind. Appeals are subject to the same rules as writs of error. R. S. U. S., Sec. 1012.

Judicial Code, Sec. 247, provides for error and appeal to Supreme Court from the District Court of Alaska, in prize cases and in the three usual cases of federal question, namely, cases involving the construction or application of the constitution of the United States, the constitutionality of a law of the United States or the construction or validity of a treaty, and where the constitution or statute of a state is alleged to be in contravention of the constitution of the United States.

Where review is sought by error instead of properly on appeal, or vice versa, the mistake shall be disregarded and the court shall proceed as if the proper proceeding had been had. Act of September 6, 1916, 39 Stat. L. 727.

This petition should be entitled in the court in which the trial was had together with an assignment of errors before the appeal will be allowed. Sup. Ct. Rule 35. A formal petition is not absolutely necessary. The approving of an appeal bond or the signing of a citation has been held a sufficient allowance. R. R. Co. v. Bradleys, 7 Wall. 577; Brown v. McConnell, 124 U. S. 489; Brandies v. Cochrane, 105 U. S. 262.

An appeal may be allowed in term time or in vacation by any justice of the Supreme Court or any judge of the District Court within his district. Sup. Ct. Rule 36.

An appeal from a District Court to the Supreme Court of the United States must be taken within three months after the entry of the final decree in the court below. Act of September 6, 1916, 39 Stat. L. 727. The time does not begin to run until the decree is entered and petition for rehearing disposed of.

An appeal is the only proper method of reviewing a decree in equity or in admiralty. Walker v. Dreville, 12 Wall. 440; McCollum v. Eager, 2 How. 61.

An appeal from a District Court will lie to the Supreme Court of the United States if the jurisdiction of the District Court rests solely on the ground that the suit arises under the constitution, laws and treaties of the United States, Am. Sugar Co. v. New Orleans, 18¹ U. S. 277; or if after the jurisdiction of the District Court attaches on the ground of diverse citizenship issues are raised, the decision

of which brings the case within either of the classes set forth in Sec. 5 of the Act of March, 3, 1891, 26 Stat. L. 826; *Loeb v. Columbia Trustees*, 179 U. S. 472.

Jurisdiction does not depend upon the amount in dispute in cases taken by writ of error or appeal from the District Courts to the Supreme Court of the United States under the Judicial Code, Sec. 238. *The Paquete Habana*, 175 U. S. 683.

Where Jurisdiction is in Issue. There are many interesting recent cases turning on the question whether jurisdiction is properly in issue and consequently whether the appeal lies directly from the District Court to the Supreme Court.

In *Mitchell Coal Co. v. Penn. R. Co.*, 192 Fed. 475, 112 C. C. A. 637, the question whether under the Interstate Commerce Act relief must not be applied for to the Interstate Commerce Commission before seeking a remedy in the District Court, is jurisdictional; in *Merriam Co. v. Saalfeld*, 241 U. S. 22, 60 L. Ed. 868, where substituted service against a non-resident was quashed; in *Cuyahoga River Power Co. v. Akron*, 240 U. S. 462, 60 L. Ed. 743, where a federal question was held to be involved in whether a power company could prevent a municipality from appropriating the waters of a stream, where the bill was dismissed because of non-involvement of the jurisdictional amount; in *Pinel v. Pinel*, 240 U. S. 594, 60 L. Ed. 817; *Rogers v. Hennepin Co.*, 239 U. S. 621, 60 L. Ed. 469; *Glenwood Co. v. Mutual Light Co.*, 239 U. S. 121, 60 L. Ed. 174.

Whether a case arose under the patent laws, in *Amer. Well Works v. Layne*, 241 U. S. 257, 60 L. Ed. 987; and in *Geneva Furniture Mfg. Co. v. Karpen*, 238 U. S. 254, 59 L. Ed. 1295; *Briggs v. United Shoe Mchy. Co.*, 239 U. S. 48, 60 L. Ed. 138.

On the question whether jurisdiction is in issue the following cases are illustrative: *Metropolitan Water Co. v. Kaw Valley*, 223 U. S. 519, 56 L. Ed. 533; *Ex parte Jim Hong*, 211 Fed. 73, 127 C. C. A. 569; *U. S. v. New York Co.*, 235 U. S. 327, 59 L. Ed. 253; *Lamar v. U. S.*, 240 U. S. 60, 60 L. Ed. 526; *Male v. Atchison, etc., R. Co.*, 240 U. S. 97, 60 L. Ed. 544. Especially see *U. S. v. Congress Constr. Co.*, 222 U. S. 199, 56 L. Ed. 163; *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360; *Bogart v. Sou. Pac. R. Co.*, 228 U. S. 137, 57 L. Ed. 768.

Where jurisdiction is the sole question the review can be only by the Supreme Court. *Amer. Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. Ed. 859; *Davis v. Cleveland R. Co.*, 217 U. S. 157, 54 L. Ed. 708; *Kentucky, etc., Board v. Lewis*, 176 Fed. 556, 100 C. C. A. 208.

Where an appeal is taken direct to Supreme Court on question of jurisdiction and error to the Circuit Court of Appeals, the latter

court can not compel an election. *Lamar v. U. S.*, 241 U. S. 103, 60 L. Ed. 912

Questions relating to proper service of process involve matters of jurisdiction, and fall within Sec. 238. *Merriam Co. v. Saalfeld*, 241 U. S. 22, 60 L. Ed. 868; *Herndon-Carter Co. v. Norris*, 224 U. S. 496, 56 L. Ed. 857; *Mech. Appl. Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272. Illustrative cases may be found in *Amer. Co. v. Layne*, 241 U. S. 257, 60 L. Ed. 987; *Latta, etc., Constr. Co. v. The Raithmoor*, 241 U. S. 166, 60 L. Ed. 937.

Prize Causes. In prize causes the Circuit Court of Appeals has no jurisdiction over the final sentence or decree, but review is direct from the District Court by the Supreme Court regardless of amount involved and without any certificate by the district judge. Judicial Code, Secs. 128 and 238; R. S. U. S., Sec. 1009; *The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320; *Withenbury v. U. S.*, 5 Wall. 819, 18 L. Ed. 613.

Special Grounds for Appeal—(a) Involving Interstate Commerce. By the Act of October 22, 1913, the Commerce Court was abolished and its jurisdiction transferred to the District Court, and when suit is brought to enforce, suspend or set aside an order of the Interstate Commerce Commission, appeal from the decision of the District Court is direct to the Supreme Court, the time limit being sixty days. And when interlocutory injunction concerning an order of the Interstate Commerce Commission is sought, the order of the District Court thereon may be appealed direct to the Supreme Court, the time therefor being limited to thirty days.

(b) Involving Anti-Trust Acts. By the Act of June 25, 1910, 36 Stat. L. 854, suits in equity arising under the so-called Sherman Anti-Trust Law of 1890, or the Interstate Commerce Law of 1887, wherein the United States is complainant, may be appealed direct from the District Court to the Supreme Court, and the time is limited to sixty days.

Appeals in habeas corpus cases may go directly to Supreme Court under Sec. 238. *Kelley v. Griffin*, 241 U. S. 6, 60 L. Ed. 861; *Bingham v. Bradley*, 241 U. S. 511, 60 L. Ed. 1136; *Henry v. Henkel*, 235 U. S. 219, 59 L. Ed. 203.

When is Appeal "Taken." An appeal is "taken" under the provisions of Sec. 11 of the Act of March 3, 1891, 26 Stat. L. 829, and under R. S. U. S., Sec. 1008, when a petition therefor has been filed in the office of the lower court with the assignment of errors, and has been allowed. *Green v. Lynn*, 87 Fed. 839, 31 C. C. A. 248; *Randall v. Foglesong Mch. Co.*, 200 Fed. 741 (6 C. C. A.), following many cited decisions at page 743 to the effect that the appeal is not "taken" until it is "in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction

over the cause, and making it its duty to send it to the appellate court."

Constitutionality Involved. Where the validity or construction of a treaty is drawn in question, the question must be substantial. *Chin Fong v. Backus*, 241 U. S. 1, 60 L. Ed. 859. This Sec. 238 of the statute is given a comprehensive review and application in *Altman v. U. S.*, 224 U. S. 583, 56 L. Ed. 894.

Although federal jurisdiction is invoked because of the federal question, all questions presented should be determined regardless of the decision upon the federal question or whether it was decided at all. *L. & N. Ry. Co. v. Finn*, 235 U. S. 601, 59 L. Ed. 379; *North-western Laundry v. Des Moines*, 239 U. S. 486, 60 L. Ed. 396.

Where a case involves solely the question of constitutionality under the federal constitution, the Supreme Court has exclusive appellate jurisdiction; this has been many times decided. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. Ed. 496.

But where other matters are also involved upon which error would lie to the Circuit Court of Appeals, the defeated party may elect whether to go to the Supreme Court or to the Circuit Court of Appeals. *Hooper v. Remmel*, 165 Fed. 336, 91 C. C. A. 322; *Harris v. Rosenberger*, 145 Fed. 449, 76 C. C. A. 225; certiorari denied in 203 U. S. 591, 51 L. Ed. 331.

As to cases where the constitution or law of a state is claimed to be in contravention of the constitution of the United States, see:

(a) The mere construction of a statute does not present a federal question. *Kruse v. Monongahela River Consolidated Coal Co.*, 211 U. S. 485, 53 L. Ed. 294.

(b) Where the Supreme Court of a state held a statute in contravention of the state and the federal constitutions, after the trial of the case in the District Court involving the question of constitutionality, the Supreme Court will not decide the question of conflict with the federal constitution, but will follow the state court on the question of conflict with the state constitution. *Metzger Motor Car Co. v. Parrott*, 233 U. S. 36, 58 L. Ed. 837.

(c) In order to come within the provision of the constitution of the United States regarding impairment of the obligation of a contract, the alleged impairment must be due to some act of the legislative power of the state, not by a decision of the judicial department only. When a state court has declared valid a state statute which impairs the obligation of contract alleged to be in contravention of the federal constitution, a question arises upon which the jurisdiction of the Supreme Court may be invoked by error proceedings. *Moore-Mansfield Constr. Co. v. Electrical Installation Co.*, 234 U. S. 619, 58 L. Ed. 1503.

(d) Whether ordinances of a municipality imposing license fees are in contravention of the federal constitution is a question upon which error direct from the District Court to the Supreme Court may be predicated. *Boise Artesian Water Co. v. Boise City*, 230 U. S. 84, 57 L. Ed. 1400.

As to cases where the constitutionality of any law of the United States is drawn in question, see *Altman v. U. S.*, 224 U. S. 583, 56 L. Ed. 694, a revenue case involving a treaty; *Essex v. N. Eng. Tel. Co.*, 239 U. S. 313, 60 L. Ed. 301; *Amer. Sugar Refining Co. v. U. S.*, 211 U. S. 155, 53 L. Ed. 129.

As to cases involving the "construction or application of the constitution of the United States," see *La. R., etc., Com'n., v. Morgan's, etc., R. R.*, 195 Fed. 66, 115 C. C. A. 127, involving commerce clause of the constitution; *Empire State Mining Co. v. Hanley*, 205 U. S. 225, 51 L. Ed. 779, involving right to jury trial; *Pierce v. Creecy*, 210 U. S. 387, 52 L. Ed. 1113, involving extradition provisions of the constitution; *Apapas v. U. S.*, 233 U. S. 587, 58 L. Ed. 1104, involving constitutional guaranty against compulsory self-incrimination.

Orders of a state commission fixing railroad rates under legislative authority are state laws within the meaning of Judicial Code, Sec. 238, allowing direct review of District Court in cases in which a law of a state is claimed to contravene the constitution of the United States. *Arkadelphia Milling Co. v. St. L. S. W. Ry. Co.*, 249 U. S. 134, 63 L. Ed. 517. Likewise, the orders of a state board of health under state pure food law. *Corn Products Co. v. Eddy*, 249 U. S. 427, 63 L. Ed. 689.

Where the District Court finally enjoined the enforcement of a state law and the Supreme Court reversed and ordered dismissal and its mandate allowed further proceedings in conformity with the opinion and decree, according to right and justice, the District Court has power thereafter to determine and decree damages arising under the injunction bonds prior to the decree reversed, and its decree as to damages is part of the main cause and itself also directly appealable to the Supreme Court. *Arkadelphia Co. v. St. L. S. W. Ry.*, 249 U. S. 134, 63 L. Ed. 517.

Where, under Judicial Code, Sec. 266, the jurisdiction of the District Court is invoked on constitutional grounds, the Supreme Court may review the whole case on appeal from an order denying preliminary injunction. *Van Dyke v. Geary*, 244 U. S. 39, 61 L. Ed. 973; *L. and N. Ry. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229.

Where application for injunction is made under Judicial Code, Sec. 266, and denied and the action is dismissed, the appeal to the Supreme Court is under Sec. 238, not 266, since the denial of the

interlocutory application was merged in the final decree. *Shaffer v. Carter*, 252 U. S. 37, 44, 64 L. Ed. —.

As to the scope of the review by the Supreme Court, see *Bien v. Robinson*, 208 U. S. 423, 52 L. Ed. 556 *Male v. Atchison, Topeka and Santa Fe Ry. Co.*, 240 U. S. 97, 60 L. Ed. 544; *Mitchell Coal Co. v. Penna. R. Co.*, 230 U. S. 247, 57 L. Ed. 1472; *N. A. Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. Ed. 195.

Both law and facts come under the review on appeal direct from decree of the District Court to Supreme Court, granting an injunction against enforcement of an ordinance as contravening the fourteenth amendment. *Cincinnati v. C. & H. Traction Co.*, 245 U. S. 446, 62 L. Ed. 389.

Certificate by District Judge. A certificate is not necessary for the review and if made can not limit the scope of the court's review. *Giles v. Harris*, 189 U. S. 475, 47 L. Ed. 909.

A formal certificate is not a pre-requisite to the review provided for by Sec. 238; where the record shows that the case was dismissed by the District Court for want of jurisdiction it is sufficient to take the place of a certificate. *Herndon-Carter Co. v. Norris*, 224 U. S. 496, 56 L. Ed. 857; *Lathrop Co. v. Interior Construction Co.*, 215 U. S. 246, 54 L. Ed. 177; *U. S. v. Larkin*, 208 U. S. 333, 52 L. Ed. 517; *Courtney v. Pradt*, 196 U. S. 89, 49 L. Ed. 398; *Mississippi R. R. Com'n v. Louisville, etc., Ry. Co.*, 225 U. S. 272, 56 L. Ed. 1087; *Apapas v. U. S.*, 233 U. S. 587, 58 L. Ed. 1104.

Final Decree. Whether a decree appealed from is final is ascertained from the face of the decree. *Paducah v. East Tenn. Coal Co.*, 229 U. S. 476, 57 L. Ed. 1286.

Where a motion for new trial or a petition for rehearing has been presented to the trial court, the judgment is still under the control of that court and is not final until such motion is disposed of. *U. S. v. Ellicott*, 223 U. S. 524, 539, 56 L. Ed. 535.

No. 1938.**Bond on Appeal from a District Court to the Supreme Court
of the United States. (1)**

Know all men by these presents, that we, A. B., as principal, and S. R. and G. H., as sureties, are held and firmly bound unto C. D. in the full and just sum of — (\$—) dollars to be paid to the said C. D., his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of —, A. D. in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a District Court for the — day of — in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a decree was rendered against the said A. B. and the said A. B. having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said C. D., citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the — (2) day of — next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute his appeal to effect, and answer all damages and costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of
S. M.
R. T.

A. B. [*Seal.*]
S. R. [*Seal.*]
G. H. [*Seal.*]

Approved by

John M. Harlan, (3)
Associate Justice of the Supreme
Court of the United States.

(1) An appeal bond is ordinarily essential to the prosecution of an appeal, although it is not to the taking of an appeal. R. S. sec. 1000 and sec. 1012; *Dodge vs. Knowles*, 114 U. S. 430; *The Dos Hermanos*, 10 Wheat. 311. It has been permitted to be given by the appellant in the Appellate Court. *Anson Bangs & Co. vs. Blue Ridge R. Co.*, 23 How. 1; *Seymour vs. Freer*, 5 Wall. 822.

As to the form of bond to answer all damages and costs if he fail to make such plea good see *Gay vs. Parpart*, 101 U. S. 391; *Chateaugay Ore & Iron Co. vs. Blake*, 35 Fed. Rep. 804; *Peace River Phosphate Co. vs. Edwards*, 70 Fed. Rep. 728, 17 C. C. A. 358. The bond should be made payable to the appellee. *Bigler vs. Waller*, 12 Wall. 142, and to no other person. *Davenport vs. Fletcher*, 16 How. 142.

The amount of the bond is fixed by the judge allowing the appeal. He is the sole and exclusive judge of what it should be and his decision is final unless he violates a statute or rule of practice. *Jerome vs. McCarter*, 21 Wall. 17.

The amount of the bond may be changed in a proper case by the Appellate Court. *Jerome vs. McCarter*, 21 Wall. 17; *Williams vs. Clafin*, 103 U. S. 753; *Harwood vs. Dieckerhoff*, 117 U. S. 200; *Johnson vs. Waters*, 108 U. S. 4, or it may give appellant an opportunity to furnish new security. *Davis vs. Wakelee*, 156 U. S. 684-5; *Union Pac. R. Co. vs. Callaghan*, 161 U. S. 95.

An appeal does not necessarily operate as a *supersedeas*. A decree in equity is superseded in the same manner as a judgment at law. R. S. sec. 1007; *Adams vs. Law*, 16 How. 148; *Hudgins vs. Kemp*, 18 How. 535; *Kitchen vs. Randolph* 93 U. S. 86.

The application for a *supersedeas* is regularly made to the court below and not to the Appellate Court. *Covington Stock Yards vs. Keith*, 127 U. S. 248.

As to when an Appellate Court will grant a *supersedeas*, see *Hunt vs. Oliver*, 109 U. S. 177; *R. R. Co. vs. Bradleys*, 7 Wall. 575.

The approval of the bond need not be in writing. *Davidson vs. Lanier*, 4 Wall. 447, nor approved in open court. *Hudgins vs. Kemp*, 18 How. 530.

The signing of a citation and taking oath of the attorney as to their sufficiency has been held to be a sufficient approval of the bond. *Silver vs. Ladd*, 6 Wall. 440.

(2) The date inserted at this point should be the date at which the citation is returnable, or thirty days after its issue. Sup. Ct. Rule 8, par. 5, except where the time is extended to sixty days, in same rule.

(3) The bond may be approved by a justice of the Supreme Court, or by any district judge within his district, or any circuit judge assigned to a District Court. Supreme Court Rule 36.

No. 1938a.**Citation to Appellee Signed by District Judge.**

The United States of America, ss.

To A. B. [*or*, C. D.], Greeting:

Whereas, C. D. [*or*, A. B.], has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the District Court of the United States for the — district of —, made in favor of you, the said A. B. [*or*, C. D.], and has filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the — day of — next(2), to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of —, in the — circuit, this — day of —, in the year of our Lord one thousand eight hundred and —.

J. S.,

Judge of the District Court of the United States
for — district of —.

No. 1939.**Citation to Appellee Signed by Supreme Court Justice.**

The United States of America, ss.

The President of the United States to C. D.—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days [*or sixty days*], from the date of this writ, pursuant to an appeal, duly allowed by the District Court for the — District of —, and filed in the clerk's office of said court on the — day of —, A. D. —; in a cause wherein A. B. and others are appellants, and you are appellee, to show cause, if any, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States this — day of —, A. D. —.

JOHN M. HARLAN,
Associate Justice of the Supreme
Court of the United States.

Service of a copy of the within citation is hereby admitted this — day of —, A. D. —.

R. Y.,
Attorney for Appellee.

(1) The citation may be signed by a justice of the Supreme Court or by the judge of the District Court, but not by the clerk. R. S., Sec. 999, Supreme Court Rule 36. It should be made returnable within thirty days from the date of the signing and served before the return day. Supreme Court Rule 8, par. 5, except where the time has been extended thereby.

Where a party dies before an appeal is allowed the suit should be revived and the citation addressed to the proper party in the record at that time. *Bigler v. Waller*, 12 Wall. 142. The citation may be served upon the attorney for the appellee in the court below. *Bacon v. Hart*, 1 Black 38; *Bigler v. Waller*, 12 Wall. 142, even though the attorney has withdrawn from the case. *U. S. v. Curry*, 6 How. 106. The service should be personal. A copy of the citation sent by mail is not sufficient. *Tripp v. Santa Rosa St. Ry. Co.*, 144 U. S. 126.

The practice with reference to citations in matters of appeals is laid down by the Supreme Court in *Jacobs vs. George*, 150 U. S. 415, as follows:

"It must be regarded as settled that

(1) Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary.

(2) Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed.

(3) Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before.

(4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the ensuing term of this court, and not waived, the appeal becomes inoperative."

Neither the issuing of the citation nor the giving of bond is jurisdictional. They may be given after the appeal taken and after the two years within which to take an appeal. *Evans vs. The State Bank*, 134 U. S. 330; *Dodge vs. Knowles*, 114 U. S. 430, 438; *The Dos Hermanos*, 10 Wheat, 306, 311.

All the appellees must be cited to appear. The citation may be issued from the Appellate Court before the end of the next ensuing term after the allowance of the appeal. *R. R. Equip. Co. vs. Southern Ry. Co.*, 92 Fed. Rep. 541, 34 C. C. A. 519; *Altenberg vs. Grant*, 83 Fed. Rep. 980, 28 C. C. A. 244.

No. 1940.

Assignment of Errors on Appeal from a District Court to the Supreme Court of the United States(1), Where Jurisdiction in Issue.

The District Court of the United States, — District of —.

| | | |
|----------------------------|---|--------|
| A. B., Plaintiff, | } | No. —. |
| vs. | | |
| C. D., et al., Defendants. | | |

The plaintiff prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

First. That the court erred in sustaining the demurrer to the bill and dismissing the bill.

Second. That the court erred in granting the motion to dissolve the temporary injunction.

The plaintiff prays that the order dissolving the temporary injunction may be suspended pending the appeal.

X. & X.,

Plaintiff's Attorneys.

(1) The assignment of errors must be filed in the District Court before the appeal is granted and should set out separately and distinctly each error asserted and intended to be urged in the Supreme Court. Supreme Court Rule 35.

No. 1941.

**Assignment of Errors on Appeal from a District Court to the
Supreme Court of the United States, Where Consti-
tutionality of State Law in Question.**

The District Court of the United States, — District of
—, — Division.

The A. B. Company, Plaintiff,

vs.

C. D., Defendant.

The*plaintiff prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

First. That said Act of the General Assembly of the state of Ohio, passed April 27, 1893, is in contravention of the Constitution of the United States, especially of the interstate commerce clause of sec. 8, Art. I; of sec. 2, Art. IV, and of sec. 1, Art. XIV.

Second. That said Act is in contravention of the Constitution of the state of Ohio, especially of secs. 2 and 5 of Art. XII, and of sec. 1 of Art. II.

Third. That said Act does not provide a method for the

taxation of the property of telegraph and express companies according to its true value in money, as required by the Constitution of the state, or by uniform rule, as compared with other property in the state, but is really an attempt to enforce against express and telegraph companies the principal business of all of those doing business in the state of Ohio and in the United States being interstate commerce the payment of a tax for the privilege of doing such business in such state, by placing a fictitious value upon their property.

Fourth. That said assessment made by the defendants against the plaintiff was not upon the valuation of the true value in money of the plaintiff's property in the state of Ohio, or upon any estimate of the value of the company's telegraph lines in Ohio, considered as property, but altogether upon the basis of other considerations, chiefly the market value of the plaintiff's capital stock; that the defendants estimated the total capital stock of the plaintiff company, to wit: 9,408 1-5 shares at the market value of the shares, to wit, \$87 per share, making \$81,780,713.40 and deducted from such sum the plaintiff's investment in bonds and stocks of other companies and the value of its real estate outside of Ohio, altogether \$13,646,556.76, leaving \$69,134,156.64 as a balance which the defendants apportioned in the proportion of the length of the plaintiff's lines in Ohio to the whole length in miles of its lines throughout the world, including its cable lines, as the said assessment against the plaintiff, claiming and pretending that the sum so assessed represents the true value in money of the plaintiff's telegraph lines within the state of Ohio; whereas said sum bears no relation to the true value in money of said lines, and is nothing but an arbitrary apportionment of the sum of the market value of the plaintiff's share without any reference whatever to the money or market value of the plaintiff's lines in Ohio.

Fifth. That said suit of State *ex rel. vs.* Jones, auditor of Lucas county, in the Supreme Court of Ohio, was gotten up

by the defendants in this suit during the pendency of the suit, and after the question as to the validity of the said Act of the General Assembly of the state of Ohio had been argued and was ordered for reargument in this suit, for the purpose of anticipating the judgment of this court upon the said questions, and of any Federal court to which the case might be taken on appeal, and of controlling the decision of the Federal courts upon the questions involved; there being in fact no real controversy or subject matter of controversy upon which to base such suit. And this court erred in withdrawing its original opinion upon the question of the constitutionality of said Act and in adopting said opinion of the Supreme Court of Ohio.

Sixth. That the court erred in sustaining the demurrer to the bill, as amended and supplemented, and in dismissing the bill.

Seventh. That the court erred in granting motion to dissolve the temporary injunction.

Wherefore plaintiff prays that the decree of the said District Court be reversed.

X. & X.,

Attorneys for the Plaintiff.

APPEALS TO THE SUPREME COURT FROM A CIRCUIT COURT OF APPEALS.

No. 1942.

Petition for Appeal from a Circuit Court of Appeals to the Supreme Court of the United States (1).

United States Circuit Court of Appeals for the — Circuit.

A. B. & E. B., Appellants }

vs.

C. D. & E. F., Appellees. }

The above mentioned appellants, A. B. and E. B., respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the — Circuit, and that a judgment has therein been rendered on the — day of —, A. D. —, affirming the decree of the District Court of the United States for the — district of —, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the — circuit has final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the — circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

R. X.,

Attorney for Appellants.

(1) This petition, together with an assignment of errors should be filed with the clerk of the Circuit Court of Appeals. The appeal may be allowed by a justice of the Supreme Court of the United States or by a judge of the Circuit Court of Appeals, who may also sign the citation and approve the bond.

An appeal from the Circuit Court of Appeals to the Supreme Court of the United States must be taken within three months after the entry of the decree sought to be reviewed. Act of September 6, 1916, 39 Stat. L. 727.

An appeal lies to the Supreme Court of the United States from a Circuit Court of Appeals as a matter of right in all cases in which the jurisdiction of the Circuit Court of Appeals is not made final by Judicial Code, Sec. 128, and the matter in controversy exceeds one thousand dollars besides costs. Judicial Code, Sec. 241; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 294; *Tex. & Pac. R. Co. v. Gentry*, 163 U. S. 353, 360; *Huntington v. Saunders*, 163 U. S. 319; *Northern Pacific R. R. Co. v. Amato*, 144 U. S. 465; *U. S. v. Freight Assn.*, 166 U. S. 290.

No appeal lies to the Supreme Court from a decree of a Circuit Court of Appeals affirming an interlocutory order of a District Court granting a temporary injunction, *Kirwan v. Murphy*, 170 U. S. 205; nor from a case in which the matter in controversy involves no money value, as in habeas corpus. *Lau Ow Bew v. United States*, 144 U. S. 47.

Only final judgments and decrees of the Circuit Court of Appeals can be reviewed in the Supreme Court on appeal or writ of error. *Southern Ry. Co. v. Postal Tel. Cable Co.*, 179 U. S. 641; *Mitchell Store Building Co. v. Carroll*, 232 U. S. 379, 58 L. Ed. 650; *U. S. v. Beatty*, 232 U. S. 463, 58 L. Ed. 686.

This jurisdiction is founded on Judicial Code, Sec. 241, drawn from the Circuit Court of Appeals Act, March 3, 1891, Sec. 6, last paragraph, and Sec. 128 of the Judicial Code must be considered along with Sec. 241.

Appeal or Error May be Prosecuted. (a) In cases where the judgment or decree of the Circuit Court of Appeals is not made final (Sec. 128 and Act of September 6, 1916, 39 Stat. L. 727, Sec. 3), review may be had appropriately by appeal or error, the jurisdictional minimum being one thousand dollars. The time is limited to three months after entry of the judgment or decree. Sec. 6 of Act of September 6, 1916, 39 Stat. L. 727.

(b) A constitutional question must have more than mere formal statement in a petition in order to invoke the jurisdiction of the Supreme Court under this section; it must appear that it really and substantially involves a dispute or controversy of that sort upon the determination of which the result depends. And this must appear not by inference but by distinct averments according to the rules of good pleading. *Hull v. Burr*, 234 U. S. 712, 58 L. Ed. 1557;

Norton v. Whiteside, 239 U. S. 144, 60 L. Ed. 186; Roman Cath. Church of St. Anthony v. Penn. R. Co., 237 U. S. 575, 59 L. Ed. 1119.

(c) Where the record shows an abandonment of the constitutional question, the judgment of the Circuit Court of Appeals is final and the provisions of this section do not apply. Huff v. Bidwell, 180 Fed. 374, 103 C. C. A. 520.

(d) It is well settled that where a case involves a question of jurisdiction and is brought on the ground of diversity of citizenship, and the case is taken for review to the Circuit Court of Appeals, error or appeal will not lie to the Supreme Court from that court. Where the case is brought on the ground of a federal constitutional question, and a question of jurisdiction is raised and determined and the case is taken to the Circuit Court of Appeals for review, error or appeal lies to the Supreme Court. Macfadden v. U. S., 213 U. S. 288, 53 L. Ed. 801.

In this case the court found it necessary to analyze the provisions of Secs. 5 and 6 of the Act of 1891, which as regards the above case are not changed by their incorporation into Judicial Code, Secs. 128 and 238, and the language of the court is applicable to the law at present in force and is highly worthy of note. This was a criminal case for violation of the statute prescribing a penalty for mailing obscene literature. Defendant, after the evidence was concluded, presented requests for instructions to the jury which were refused and exceptions were noted. The Supreme Court notices four of these requests to rule on the ground of unconstitutionality of the statute, namely:

- (a)—It abridged the freedom of the press;
- (b)—It was uncertain and created no general rule of conduct, and therefore the indictment was without due process of law;
- (c)—It was an ex post facto law;
- (d)—It delegated legislative power to the jury or court.

Defendant was convicted and judgment was entered, and the case went on error to the Circuit Court of Appeals, which affirmed the judgment, and now the question before the Supreme Court was as to the right to writ of error to the Circuit Court of Appeals.

At page 293, on the authority of Loeb v. Columbia Tp. Trustees, 179 U. S. 472, and Robinson v. Caldwell, 165 U. S. 359, the court assumed that a writ of error might have been sued out direct from the District (Circuit then) Court to the Supreme Court on the record made below, but since that route was not pursued that question is not up for decision.

The court proceeds with the discussion of right of petitioner here, and at page 294 says the right depends upon whether under the statutes the judgment of the Circuit Court of Appeals is final.

The reasoning of the court is interesting and illustrates the difficulties in this field of federal procedure: "It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by Sec. 5 of the Act (of 1891), is based upon the nature of the case, or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by Sec. 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely the District Court (omitting Circuit Court), whether the jurisdiction rests upon the character of the parties or the nature of the case. * * * The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the Circuit Court of Appeals to this court, is important, and a neglect to observe it leads to confusion."

The court upon the authority of *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290; *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, and *L. and N. R. Co. v. Mottley*, 211 U. S. 149, concludes that jurisdiction in this case having been originally invoked solely on the ground of a criminal statute, it was immaterial that a substantial constitutional question was subsequently raised; that fact merely gave the right to review directly from the trial court by the Supreme Court. But that course not having been pursued, when the case was taken to the Circuit Court of Appeals its judgment thereon was final; hence there was no review by the Supreme Court.

This principle has been frequently made the basis of decision since in the Supreme Court. In *Vicksburg v. Henson*, 231 U. S. 259, at page 267, the case presented the specific fact that the constitutional question was made by the plaintiff in an amended and supplemental bill, and the court held this was the equivalent of setting it up in the original bill, hence the decree of the Circuit Court of Appeals was not final and appeal would lie therefrom to the Supreme Court. Therefore, where the plaintiff comes into the trial court distinctly alleging the substantial grounds of federal jurisdiction, namely diversity and federal question, the case may be taken direct from the District Court to the Supreme Court, or via the Circuit Court of Appeals to the Supreme Court, on appeal or error.

The *Macfadden* case is also followed in *Chott v. Ewing*, 237 U. S. 197, at page 202. Also, in *Merriam Co. v. Syndicate Pub. Co.*, 237 U. S. 618, at page 621.

In *Southern Pacific Co. v. Stewart*, 245 U. S. 359, at page 364, also, the *Macfadden* case is followed. The case is interesting because it was removed to the District Court on a petition setting out only diversity of citizenship as the ground for claiming federal jurisdic

tion, although the suit was brought under a federal statute—the Carmack Amendment—to recover damages for goods lost in interstate traffic. The court therefore found at page 365, that the jurisdiction of the District Court was invoked solely on the ground of diversity of citizenship and therefore the judgment of the Circuit Court of Appeals was final.

The court again says at page 364 that the right to error or appeal from the Circuit Court of Appeals depends upon the grounds upon which the jurisdiction of the District Court was originally invoked.

Although the question was not decided, it seems a plain inference from these cases that if this Southern Pacific case had been originally brought in the District Court the Supreme Court would have had jurisdiction under the facts.

These decisions can readily be harmonized by applying the principle asserted in *Chott v. Ewing* above, that the provisions of the Judicial Code were obviously intended not to enlarge the jurisdiction of the Supreme Court but to relieve it, and in this spirit the provisions should be construed. The *Macfadden* case is again cited in *Alaska Pacific Fisheries Co. v. Alaska*, 249 U. S. 53, at page 61, 63 L. Ed. 474.

Where the complaint in the District Court averred that the construction and application of mentioned federal mining statutes were involved, the judgment of the Circuit Court of Appeals thereon is appealable to the Supreme Court. *Butte, etc., Co. v. Clark, etc., Co.*, 249 U. S. 12, 63 L. Ed. 433.

The Conformity Act (R. S. U. S., Sec. 914), has no application to appellate proceedings either in Circuit Court of Appeals or Supreme Court. *Camp v. Gress*, 250 U. S. 308, 317, 63 L. Ed. 997.

No. 1943.

Order Allowing Appeal from a Circuit Court of Appeals to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the ———
Circuit.

A. B., et al., Appellants,

vs.

C. D., et al., Appellees.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

H. L.,

United States Circuit Judge, ——— Circuit.

No. 1944.**Affidavit as to Amount in Controversy (1).**

The Supreme Court of the United States.

The Iron Company, Appellant

vs.

The Pacific Company *et al.*, Appellees.

State of —, }
—County, } ss.

I. H., of said county, being duly sworn, on his oath says that he is assistant secretary of the appellant and is personally acquainted with its business affairs; that the business and sales of said appellant in steel and iron products in San Francisco, California, during the period since June, 1896, and up to the date hereof, and which were transported over the railroads of the appellees herein amounted to in the past and will amount to in the future, if not prevented by rates above 37½c. and 45c. per 100 pounds in carloads, to more than \$5,000 per month, or an average of over \$60,000 per annum, and that the amount of damages sustained by appellant by reason of the high rates prevailing from Pueblo, Colorado, to San Francisco, California, from 1892 to June, 1896, and from Pueblo to San José, Maryville, Stockton, and Oakland, California, ever since 1892, exceed the sum of \$5,000; that the raising of the rates on such products from Pueblo to San Francisco to equal rates prevailing from Chicago to San Francisco and the maintenance of prevailing rates from Pueblo to said other named places will effectually and entirely prevent any sales of such products being made by appellant in either of said places in California, and that the matters referred to are in controversy in this suit, and the amount so in controversy exceeds the sum of \$5,000, exclusive of interest and costs.

I. H.

Subscribed and sworn to before me this — day of —.

My commission expires July first, —. S. McK.,

[*Seal.*]

Notary Public in and for said county.

(1) The amount in controversy on appeal from a Circuit Court of Appeals to the Supreme Court must exceed one thousand dollars besides cost. Judicial Code, Sec. 241. The fact may appear from affidavit after the appeal is taken or by stipulation. See U. S. v. Freight Assn., 166 U. S. 310.

No. 1945.

Bond on Appeal from Decree of Circuit Court of Appeals to the Supreme Court of the United States (1).

Know all men by these presents that we, A. D. and J. O., of the county of —, state of —, are held and firmly bound unto the Southern Pacific Railroad Company in the sum of — dollars, to be paid to the said Southern Pacific Railroad Company; we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of —, A. D. —.

Whereas the appellants in the above entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the — circuit on the — day of —.

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

A. D.

J. O.

State of —, County of —, ss.

A. D. and J. O., sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the county of —, state of —, and is worth the sum of — dollars over

and above all his just debts and liabilities, exclusive of property exempt from execution.

A. D.

J. O.

Subscribed and sworn to before me this — day of —,
A. D. —. G. R.,

[Seal.] Notary Public in and for the County
of —, State of —.

The foregoing bond is approved this — day of —,
A. D. —. H. L.,

United States Circuit Judge, — Circuit.

(1) The form and manner of giving bond on appeal from the Circuit Court of Appeals to the Supreme Court is the same as on appeal to the Circuit Courts of Appeals or to the Supreme Court from a District Court. See notes to Forms Nos. 1797 and 1938.

The bond may be approved by a justice of the Supreme Court or a circuit judge allowing the appeal.

With reference to superseding a judgment or decree of a Circuit Court of Appeals on appeal to the Supreme Court, see *L. & N. R. Co. v. Behlmer*, 169 U. S. 644.

No. 1946.

Citation to Appellees on Appeal from a Circuit Court of Appeals to the Supreme Court of the United States.(1)

The United States Circuit Court of Appeals, — Circuit.

The United States of America, — Circuit.

To the C. D. Company and the E. & F. Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the — circuit, wherein the Iron Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal

mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable H. L., judge of the United States Circuit Court of Appeals for the — circuit, this — day of —, A. D. —.

H. L.,

Judge United States Court of Appeals, — Circuit.

(1) A citation should issue on appeal to the Supreme Court of the United States as in other appeals.

The citation may be signed by a justice of the Supreme Court or a circuit judge allowing the appeal. R. S., Sec. 999.

The citation should be made returnable within thirty days from the date of signing and served before the return day, Supreme Court Rule 8, par. 5, except where the time has been extended thereby.

The practice with reference to citations in matters of appeals is laid down by the Supreme Court in *Jacobs v. George*, 150 U. S. 415. Neither the issuing of the citation or the giving of bond are jurisdictional. They may be given after taking the appeal and after the expiration of the three months within which the appeal must be taken. Consult *Evans v. The State Bank*, 134 U. S. 330; *Dodge v. Knowles*, 114 U. S. 430, 438; *The Dos Hermanos*, 10 Wheat. 311.

No. 1947.

Assignment of Errors on Appeal from Circuit Court of Appeals to the Supreme Court of the United States(1), Where Right Claimed Under Federal Law.

The United States Circuit Court of Appeals, — Circuit.

A. B. and C. D. and E. F., Executrix and Executor of the Estate of C. S., Deceased,
Appellants,

vs.

Southern Pacific Railroad Company, Appellee.

} Assignment of Errors.

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith

their assignment of errors, as to which matters and things they say that the decree entered herein on the — day of —, is erroneous, to wit:

First. The tract of land in this cause being situated outside of the granted limits of the grant of appellee and within the indemnity limits of appellee's grant, and the application of appellee to select said land as indemnity not having been approved by the secretary of the interior, the court erred in adjudging that the appellee by its congressional grant had or acquired any right, title, or interest, legal or equitable, to said land.

Second. The said tract of land having been patented to appellant A. B. prior to said land having been selected by the appellee as indemnity and prior to any approval of such selection by the secretary of the interior, the court erred in adjudging that in and by the issuance of said patent by the United States to appellant A. B. the appellee was not finally concluded and estopped by such determination from having or claiming under its said grant any title or interest in said tract.

Third. Upon the admitted facts disclosed by the pleadings and stipulations of the parties, the court erred in adjudging that the appellee was not barred and estopped by laches from commencing or maintaining this suit.

Fourth. The appellee never having filed a map of definite location on its whole road, but only a part thereof, was not authorized to select any land as indemnity.

Fifth. The court erred in adjudging that the lands within the indemnity limits of the Southern Pacific railroad, including the land in suit, were withdrawn by operation of law upon filing the map of general route.

Sixth. As the land in suit was entered by appellant A. B. on September 2, 1885, and final proof made under the homestead law on June 7, 1886, and patent from the United States issued thereunder on April 11, 1890, the court erred in adjudging that the application to select or selection of the Southern

Pacific Railroad Company, made on July 13, 1891, operated to confer upon the company any legal or equitable right to the land.

Wherefore the appellants pray that said decree may be reversed and that the appellants may have an adjudication and decree in their favor as herein specified.

R. X.,

Attorney for Appellants.

(1) The assignment of errors should be filed in the Circuit Court of Appeals before the appeal is granted and should set out separately and distinctly each error to the decree of the Circuit Court of Appeals intended to be urged in the Supreme Court. Sup. Ct. Rule 35.

No. 1948.

**Assignments of Error on Appeal from Decree of Circuit Court
of Appeals to the Supreme Court of United States,
Involving Jurisdiction of the Interstate Commerce Commission.**

The United States Circuit Court of Appeals, — Circuit.

The Iron Company, Appellant,

vs.

The Pacific Company and The } Assignment of Errors.
C. & D. Railroad Compa-
ny, Appellees. }

And now comes the appellant, The Iron Company, by C. B., its solicitor, and says that in the record and proceedings herein there is manifest error, and that the United States Circuit Court of Appeals for the eighth circuit erred in this, to wit:

First. In holding and deciding that the order of the Interstate Commerce Commission establishing rates on steel and iron from Pueblo, Colorado, to San Francisco, California, proportionate or relative to rates fixed by the carriers on similar articles from Chicago, Illinois, to San Francisco, California, was a void order.

Second. In holding and deciding that the restraining order of the District Court which sought to put the commission's said order in force was erroneous, and in reversing the order of said District Court in respect thereto.

Third. In holding and deciding that the District Court prescribed or undertook to prescribe a maximum rate of 45c. and 37½c. on steel and iron products between Pueblo and certain cities on the Pacific slope.

Fourth. In holding and deciding that the District Court fixed or undertook to fix said rate by determining with reference to past rates what was a reasonable one and then enjoining defendant from charging more in the future than it had found to be reasonable compensation in the past.

Fifth. In holding and deciding that the action of the District Court, if based on the grounds alleged in the last two preceding assignments, was or would have been erroneous.

Sixth. In holding and deciding that the power to prescribe rates for interstate commerce does not belong to the Federal courts under the facts alleged in the bill of complaint and to the extent therein prayed.

Seventh. In refusing to uphold and affirm that part of the order and decree of the District Court which restrained defendants in general terms from demanding unreasonable rates, giving undue and unreasonable preferences to persons and localities, and subjecting complainant to an unreasonable disadvantage, etc., and in holding that no special advantage would accrue to complainant from such order.

Eighth. In holding and deciding that the District Court fixed or prescribed a maximum rate between Pueblo and San Francisco.

Ninth. In holding and deciding that until an alleged unreasonable rate has been either paid or demanded on an actual tender of merchandise for shipment it is not within the legitimate province of a court of equity to interpose and fix a maximum rate and enjoin the carrier from demanding more.

Tenth. In holding and deciding that in enjoining the defendant from charging more than 45c. and 37½c. as rates aforesaid under the facts alleged in the bill the District Court was making a contract between the shipper and carrier, or that such order was beyond the powers of a court of equity.

Eleventh. In holding and deciding that there was an adequate remedy at law for the wrongs threatened, and that the damages sustained thereby could be readily ascertained and fully compensated.

Twelfth. In holding and deciding that a single verdict of a jury would avoid further actions.

Thirteenth. In holding that the order and decree of the District Court restraining defendants from raising existing rates was erroneous and in excess of its power.

Fourteenth. In reversing the decree below as to rates and dismissing the bill.

Fifteenth. In not affirming the decree below ordering the continuance of existing rates and awarding attorneys' fees to complainant.

Sixteenth. In not holding that the carriers having themselves fixed and for two years maintained rates of 37½c. and 45c. between Pueblo, Colorado, and San Francisco, and having admitted the same to be reasonable, were bound to continue them, and that the District Court had power to restrain any increase in such rates.

Seventeenth. In not reversing the decree below in so far as it denied damages to complainant.

Wherefore the appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

C. B.,

Solicitor for Appellant.

No. 1949.**Assignment of Errors on Appeal from a Circuit Court of
Appeals to the Supreme Court of United States,
Involving Right Claimed Under State Law.**

United States Circuit Court of Appeals

For the ——— Circuit.

A. B. & E. B., *et al.*, Appellants,

vs.

C. D., *et al.*, Appellees.

Comes now, A. B. and E. B., appellants, by their counsel, R. X., Esq., and respectfully represents that they feel themselves to be aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the ——— Circuit in the above entitled cause, and assign error thereto, as follows: The court erred in dismissing complainant's bill.

First. Because the great preponderance of evidence showed that the state line between Tennessee and North Carolina was as claimed by plaintiffs on the main ridge forming divide of the waters around by the McDaniel Bald mountain, and that plaintiff's title was valid and defendant's claim to title should have been removed as clouds on plaintiff's title.

Second. Because the line claimed by defendant's crossing Tellico river was in direct contradiction and violation of the Cession Acts, the acts of the legislatures of North Carolina and Tennessee establishing the boundary between the states.

Third. Because the court disregarded the calls as given in Cession Act of 1789 and the acts of Tennessee and North Carolina confirming the reports of commissioners establishing the state line, and considered parol evidence to establish a line different from that called for in said Session Act and the confirmatory acts of Tennessee and North Carolina establishing the line.

Fourth. Because the great preponderance of evidence showed that the state line between Tennessee and North Carolina followed the divide or waters around the head of

Telico river as originally located by the joint legislation of the two states and the recognition for more than fifty years.

Fifth. Because testimony tending to show marked trees on a line different from the plain language of the acts of the legislature establishing the line should have been excluded.

Sixth. Because the undisputed testimony showed that the main ridge line was 1,000 feet higher than the line claimed by defendants, and that this natural wall boundary neither required nor was susceptible of marking.

Wherefore the said appellants pray the honorable court to examine and correct the errors assigned, and for a reversal of the decree of the United States Circuit Court of Appeals for the —— Circuit entered in the above entitled case.

R. X.,
Attorney for Appellants.

No. 1950.

Findings of Facts and Conclusions of Law by a Circuit Court of Appeals in Bankruptcy to the Supreme Court.(1)

Appeal to the Supreme Court in such case is abolished by Act of January 28, 1915, 38 Stat. L., 804; Central Trust Co. v. Lueders, 239 U. S. 11, 60 L. Ed., 119.

No. 1951.**Petition for Appeal to the Supreme Court of the United States
from Supreme Court of Philippine Islands in
Habeas Corpus.(1)**

[Caption.]

To the Honorable Supreme Court of the Philippine Islands:—

It appearing in the above styled cause that on the 4th day of January, 1911, the petitioner, Robert G. Shields, filed in this court a petition against José McMicking, Sheriff of Manila, praying that a writ of habeas corpus issue in his favor upon the ground that he was being illegally deprived of his liberty by virtue of a judgment dictated by the Honorable Charles S. Lobingier, Judge of the Court of First Instance of Manila, in that said Court of First Instance denied the petitioner the due process of law guaranteed by the Philippine Bill; that is to say, that on December 21, 1910, the petitioner appealed to the Court of First Instance of Manila from the judgment of the municipal court of Manila finding him guilty of the crime of theft, and on December 23, 1910, was notified that his said cause would be tried on the 24th of said month at 10 o'clock in the morning; that when said case was called on said date and at said hour the petitioner, upon hearing the complaint, asked time to answer the same, which was denied by the court, and that the court ordered the clerk to enter a plea of not guilty; that the attorney for the petitioner also asked time to prepare the defense, which was also denied by said court, to which the attorney for the petitioner excepted and asked that his request and his exception to the action of the court be made of record: and that upon the foregoing allegations the petitioner prayed the Supreme Court to issue a writ of habeas corpus in his favor annulling the judgment dictated by the Court of First Instance as being contrary to law, and that the petitioner be placed at liberty:

It further appearing that on the 5th day of January, 1911, the clerk of this Supreme Court issued an order of this court to the sheriff of the city of Manila, or to the person having custody of the petitioner, directing him to appear before this court on the 6th day of said month, at 9 o'clock in the morning, and show cause why the writ of habeas corpus petitioned by Robert G. Shields should not be issued;

It further appearing that on the 6th day of January, 1911, the sheriff of Manila made return to said order of the court and showed that said petitioner was not in the custody or under the control of said sheriff because the said petitioner, by virtue of the judgment dictated by the Honorable Charles S. Lobingier, Judge of the Court of First Instance of Manila, in criminal case No. 6911 against the said petitioner for theft, was sentenced to the penalty of four months and one day of arresto mayor, and a commitment was issued by the judge of said court, and that the said Robert G. Shields was, by virtue of said commitment, delivered to the Director of Prisons on the 4th day of January, 1911;

It further appearing that on the 6th day of January, 1911, the Director of Prisons also made return to said order of this court, stating that the said Robert G. Shields was then in the custody and under the control of the Director of Prisons by virtue of a certain commitment issued by the Honorable Charles S. Lobingier, Judge of the Court of First Instance of Manila, and was serving a sentence of four months and one day of arresto mayor under a judgment of said Court of First Instance of Manila in criminal case No. 6911 against the said Robert G. Shields for the crime of theft;

It further appearing that on the 13th day of January, 1911, this court ordered the release of the petitioner from the custody of the Director of Prisons under a bond in the sum of P500.00, Philippine currency;

It further appearing that on the 13th day of January, 1911, this court rendered its decision in this cause, wherein and

whereby it was held by a majority of this court that the denial to the petitioner, as the accused in a criminal case, of the time to prepare for trial "is in effect the deprivation of the constitutional right to due process of law," and "that habeas corpus ought to lie by reason of the general revisory and supervisory powers which this court has in cases of this kind," to which decision an exception was duly filed;

It further appearing that on the 2nd day of April, 1912, the respondents filed a motion for a rehearing in this cause, which motion was by this court overruled on the 26th day of November, 1912, to which action of the court an exception was duly filed;

It further appearing that on the 6th day of December, 1912, this court rendered its final judgment or decree in this cause, wherein it was ordered, adjudged, and decreed by the court that the writ of habeas corpus issue as prayed for and that the petitioner be immediately given his liberty, to which judgment and decree of the court an exception was duly filed;

The above named respondents conceiving themselves aggrieved by the decision of this honorable court rendered on the 25th day of March, 1912, and by the decision of the court on the 26th day of November, 1912, overruling respondents' motion for a rehearing, and by the said decree of the court entered on the 6th day of December, 1912, do hereby appeal therefrom to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith; and the respondents pray that this appeal be allowed, and that a true copy of the record and of the assignment of errors and of all proceedings in the case (in accordance with the accompanying written stipulation of counsel in this cause), duly authenticated by the clerk of this court, be sent to the Supreme Court of the United States at Washington, District of Columbia;

Wherefore, the respondents pray this honorable court to appoint a date for a hearing to be had on this petition, as

soon as practicable, and to fix the amount of bond that the petitioner and appellee in this cause shall give to abide any decision or judgment that may be rendered against him by the Supreme Court of the United States or by this Supreme Court; and respondents further pray for such other and further orders and proceedings as may be just and equitable in the premises.

Manila, P. I., December 9, 1912.

(Sgd.)

GEORGE R. HARVEY,
Solicitor-General for the Philippine Islands,
Attorney for Respondents and Appellants.

Received copy this 9th day of Dec., 1912.

ELLSWORTH E. ZOOK,
Attorney for Petitioner.

(1) Taken from the record in *McMicking v. Shields*, 238 U. S. 99. **Special Provisions of Judicial Code for Appeal or Error to Supreme Court—(1) From Philippine Islands.** Judicial Code, Sec. 248, provided for error and appeal from the Supreme Court of the Philippine Islands to the Supreme Court of the United States, but by Act of September 6, 1916, 39 Stat. L. 727, error and appeal were abolished, and certiorari provided as the only method of review, with a time limit of six months, and any case subject to review before this enactment will thereafter be subject to review by certiorari.

(2) **From Porto Rico.** Judicial Code, Sec. 244 has been repealed, and error and appeal from the Supreme Court of Porto Rico and the United States District Court for Porto Rico are now provided for in Judicial Code, Secs. 128 and 238, with respect to that District Court and Sec. 246 with respect to that Supreme Court, and essentially all questions relating to error and appeal from said courts are now treated the same as those relating to any other district or state Supreme Courts discussed above.

(3) **From Territories.** Judicial Code, Sec. 245, relating to error and appeal from the Supreme Courts of the territories of Arizona and New Mexico, has been superseded by the legislation creating them into states.

Judicial Code, Sec. 249, relates to appeals and error when a territory becomes a state, and is no longer of any importance.

(4) **Hawaii and Porto Rico Supreme Courts.** Judicial Code, Sec. 246, provides for error and appeal from the Supreme Courts of

Hawaii and Porto Rico, on the basis provided for in Sec. 237, from the designated courts of the states. Certiorari in all other cases, civil and criminal, is provided for. The time limited for the presentation of petition for certiorari has, however, been reduced to three months by Act of September 6, 1916, 39 Stat. L., page 727.

(5) **District of Columbia Court of Appeals.** Judicial Code, Sec. 250, deals with appeals and error from the Court of Appeals of the District of Columbia to the Supreme Court of the United States, and provides for review

- (a)—Where the jurisdiction is in issue;
- (b)—In prize cases;
- (c)—In cases involving construction or application of Constitution of the United States, constitutionality of any federal law, or validity or construction of a treaty;
- (d)—In cases where constitution or law of any state is claimed to be in contravention of the federal constitution;
- (e)—In cases in which the validity of an authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question;
- (f)—In cases in which defendant draws in question the construction of a federal law.

The judgment and decrees in certain kinds of cases are made final, depending on subject matter; error and appeal are placed on the same footing as in the other Circuit Courts of Appeals.

(6) **Bankruptcy Cases.** Judicial Code, Sec. 252, provides for appellate jurisdiction of the Supreme Court in bankruptcy cases; it has been amended at various times, in the interest of final jurisdiction in the Circuit Court of Appeals, and at present the Supreme Court exercises in bankruptcy proceedings the appellate jurisdiction from the District Courts the same as in other cases therefrom; cases may be brought over to the Supreme Court from the Circuit Court of Appeals by writ of certiorari, and cases may be certified as where other matters are involved.

See amendment to Sec. 252 in Act of January 28, 1915, 38 Stat. L. 804, and a practical restatement thereof in Act of September 6, 1916, 39 Stat. L. 727.

(7) **Court of Claims.** Appeals from the Court of Claims to the Supreme Court, Judicial Code, Sec. 242, are allowed on behalf of the United States from all adverse judgments, and on behalf of the plaintiff where the amount in controversy exceeds \$3,000, or where the claim is forfeited to the United States by the judgment of the Court of Claims under the provisions of Judicial Code, Sec. 172.

Such appeal must be taken within ninety days after judgment rendered. Judicial Code, Sec. 243.

Findings of fact by the court of claims are conclusive upon the Supreme Court on appeal. *Cramp Shipbuilding Co. v. U. S.*, 239 U. S. 221, 60 L. Ed. 238.

And where additional findings are desired, or the findings are alleged to be based on mistake, the remedy is a remand to the court of claims with instructions to make and transmit findings on the points desired. *Monroe v. U. S.*, 37 Ct. Cls. 79; *Ripley v. U. S.*, 220 U. S. 491, 55 L. Ed. 557.

The Court of Claims is in a situation not different from any other court when its decree has been reviewed and finally adjudged by the Supreme Court—it must proceed only according to the mandate. Hence it can not upon supplemental petition modify its decree in a particular wherein it had been affirmed by the Supreme Court. *Eastern Cherokees v. U. S.*, 225 U. S. 572, 582, 56 L. Ed. 1212, following the rule laid down with great precision in *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255.

**CERTIORARI TO REMOVE A CASE FROM A CIRCUIT
COURT OF APPEALS TO THE SUPREME COURT.**

No. 1952.

**Notice of Application to the Supreme Court for Writ of Cer-
tiorari (1).**

United States Circuit Court of Appeals for the ——— Circuit.
A. B., Plaintiff in Error [*or* Appellant]

vs.

C. D., Defendant in Error [*or* Appellee].

The plaintiff in error [*or* appellant] is hereby notified that the defendant in error [*or* appellee] will on Monday, the ——— day of ———, upon its verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion [*a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you*] to the Supreme Court of the United States, in its court room at the capitol, in the city of Washington, D. C.

R. Y.,

Attorney for Defendant in Error [*or* Appellee.]

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of *certiorari* and brief in support of the petition are hereby acknowledged.

R. X.,

Attorney for Plaintiff in Error [*or* Appellant].

(1) Sufficient notice must be given counsel for the respondent of the day selected to enable them to file briefs in opposition if they desire to do so.

Proof of service of this notice must be filed in the clerk's office. If counsel will not accept service it may be served and proof made by affidavit.

The motion should be made some Monday, that being motion day in the Supreme Court.

No. 1953.

**Motion for Writ of Certiorari from the Supreme Court to a
Circuit Court of Appeals.**

The Supreme Court of the United States.
October Term.

C. D., Petitioner,

vs.

A. B., Respondent.

Comes now C. D. by R. Y., Esq., its counsel, and moves this honorable court that it shall by *certiorari* or other proper process directed to the honorable, the judges of the United States Circuit Court of Appeals for the — Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent, A. B. was plaintiff in error [*or appellant,*] and your petitioner, C. D., defendant in error, [*or appellee,*] and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

R. Y.
Counsel.

No. 1954.**Petition for Writ of Certiorari from the Supreme Court of the United States to a Circuit Court of Appeals (General Form).**

The Supreme Court of the United States, October Term,

—.

C. D., Petitioner,

vs.

A. B., Respondent.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, C. D., respectfully represents that [*here set forth succinctly the proceedings in the cause up to and including the decision of the Circuit Court of Appeals and the grounds upon which it is insisted that the decree or judgment of the Circuit Court of Appeals should be reversed and conclude as follows*]:

Your petitioner believes that the aforesaid decree [*or judgment*] of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the — circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled A. B. *vs.* C. D., No. —, to the end that the said case may be reviewed and determined by this court as provided in Judicial Code, Sec. 240, or that your petitioner may have such other or further relief or remedy

in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray.

R. Y.,
S. Y.,
Counsel.

(1) The application for writ of certiorari to remove a case from the Circuit Court of Appeals to the Supreme Court must be made to the Supreme Court. The time within which the application must be made is three months, prescribed by 39 Stat. L. 727, Act of September 6, 1916.

The application is made by petition. The style of the case in that court is A. B., petitioner *vs.* C. D., respondent. The petition is filed in the office of the clerk of the Supreme Court, together with a deposit of twenty-five dollars on account of costs and an entry of appearance for the petitioning party, signed by a member of the bar of the Supreme Court. The case is then docketed. The petitioner must also file a certified copy of the entire record, including all the proceedings in the Circuit Court of Appeals. Sup. Ct. Rule 37. A sufficient number of the printed copies of this record (not less than ten) must also be furnished to supply the court. These printed copies may usually be obtained from the clerk of the Circuit Court of Appeals. In case they cannot be so obtained the record must be reprinted under the supervision of the clerk of the Supreme Court. In such cases it is usually desirable to print at least fifty copies, in order that there may be a sufficient number for use on the final hearing, should the petition be granted.

Some Monday should be fixed for the submission of the petition, that being motion day. Sufficient notice must be given counsel for the respondent of the day selected to enable them to file briefs in opposition, if they desire to do so. Proof of service of such notice must be filed in the clerk's office. The petition must be called up and submitted in open court by counsel. The application is submitted on briefs. Oral arguments are not permitted.

When a writ of *certiorari* is granted it is issued by the clerk of the Supreme Court and sent to the clerk of the Circuit Court of Appeals

from which the case is to be removed. A return to such writ is ordinarily made pursuant to a stipulation of counsel filed in the office of the clerk of the Circuit Court of Appeals. The stipulation is in effect an agreement that the transcript of record filed with the application for the writ may be taken as a return to the writ and no new transcript made. The clerk returns the writ by endorsing thereon a copy of the stipulation. This writ is returned to the office of the clerk of the Supreme Court and the case is then pending in the Supreme Court, upon the writ of *certiorari*. The questions arising upon the record are determined according to fixed rules of law. *Amer. Constr. Co. vs. Jacksonville Ry. Co.*, 148 U. S. 372. A case so removed to the Supreme Court is pending there as if on the appeal of the petitioner, and only his assignments of error will be considered by that court, *Hubbard vs. Trd.*, 171 U. S. 474, unless the respondent also applies for *certiorari*. The burden is upon the petitioner, and he is allowed to open and close the argument, as in the case of an appeal.

Whenever a case has been reviewed and determined by the Supreme Court on a writ of *certiorari* to a Circuit Court of Appeals the mandate issues directly to and the cause is remanded to the proper district for further proceedings in pursuance of such determination. Act of March 3, 1891, 26 Stat. L. 826, Sec. 10. This section is preserved unchanged. Where the Circuit Court of Appeals failed to consider the case the remand is to that court for hearing. *Lutcher Co. v. Knight*, 217 U. S. 257, 54 L. Ed. 757.

The authority for the Supreme Court to issue writs of *certiorari* is founded on the Act of March 3, 1891, Sec. 6, brought forward in Judicial Code, Sec. 240, and extends to all classes of cases in which the jurisdiction of a Circuit Court of Appeals is final and the case is pending in the Circuit Court of Appeals, *Forsyth v. Hammond*, 166 U. S. 513; and bankruptcy cases by Sec. 25d of Bankruptcy Act of 1898, 30 Stat. L. 544, reenacted in Judicial Code, Sec. 252; and *certiorari* is now the only method of review of a final decree of the Circuit Court of Appeals in a bankruptcy case, and the petition therefor must be filed with the Supreme Court within three months from the date of the decree or judgment. 38 Stat. L. 804, Act of January 28, 1915. This act repeals Bankruptcy Act, Sec. 25b; *Central Trust Co. of Ills. v. Lueders*, 239 U. S. 11, 60 L. Ed. 119. The question at what stage of the proceedings and under what circumstances a case should be required to be sent up for review is left to the discretion of the Supreme Court and as the exigencies of each case may require. *Am. Constr. Co. v. Jacksonville Ry. Co.*, 148 U. S. 380. The court will not grant a writ of *certiorari* where there is a remedy by appeal or error. *In re Tampa Suburban Ry. Co.*, 168 U. S. 583; *Pullman Pal. Car Co. v. Cent. Transp. Co.*, 171 U. S. 138. The writ may be granted before the Court of Appeals has announced its judgment, as in *The Three Friends*, 166 U. S. 1, as explained in *Forsyth v. Hammond*, 166 U. S. 513, or after the mandate of the Circuit Court of Appeals has issued. *The Conqueror*, 166 U. S. 110. In *Security Trust Co. v. Dent*, 187 U. S. 237, the Supreme Court allowed a writ of *certiorari*

and directed that the copy of the record filed under a writ of error improperly sued out be taken as a return to the certiorari.

In the earlier cases the Supreme Court announced certain rules governing the granting or refusing of writs of certiorari. Later, however, the practice of the Supreme Court has been to exercise its discretion in each individual case and announce that the writ was granted or denied without giving its reasons therefor.

Under special cases in which certiorari may issue, Judicial Code, Sec. 240, the writ will lie to final judgments of the Circuit Court of Appeals "upon the petition of any party thereto." Under Sec. 251, to the Court of Appeals of the District of Columbia. Under Sec. 246, to the Supreme Courts of Hawaii and Porto Rico. In cases set out in the so-called Clayton Anti-Trust Act, 38 Stat. L. 734, Sec. 11. To the Supreme Court of the Philippine Islands,

To the Supreme Court of the Philippine Islands, under the Act of September 6, 1916, 39 Stat. L. 726, superseding Judicial Code, Sec. 248. To the highest court of a state, as provided in Judicial Code, Sec. 237, 39 Stat. L. 726, Act of September 6, 1916. To the cases set out in 39 Stat. L. 727, September 6, 1916, Sec. 3, covering final judgments:

- (a) In Bankruptcy;
- (b) Under Federal Employers' Liability Act;
- (c) Under Railroad Hours of Service Act;
- (d) Under Safety Appliance Acts.

For the power to issue this writ in bankruptcy cases, see Sec. 25d of the Bankruptcy Act of 1898, and the Act of January 28, 1915, 38 Stat. L. 804 (practically reenacted in 39 Stat. L. 727), which repeals Sec. 25b of the Bankruptcy Act and the three middle paragraphs of Judicial Code, Sec. 252, whereby proceedings in error were authorized from the Circuit Court of Appeals to the Supreme Court. *Security Trust Co. v. Lueders*, 239 U. S. 11, 60 L. Ed. 119.

Time in Which Application to be Made. By Act of September 6, 1916, 39 Stat. L. 727, this writ must be applied for within three months after entry of the decree or judgment complained of. See also, Supreme Court Rule 37.

Certiorari not a Substitute for Error or Appeal. A case which may come to the Supreme Court by appeal or error proceedings under Judicial Code, Secs. 128 and 241, can not be brought up by certiorari under Sec. 240. This has been held over and over, but is again affirmed after some comparative consideration of the above sections as well as Sec. 262, in *U. S. v. Beatty*, 232 U. S. 463, 58 L. Ed. 686.

Where a case is not within the provisions of Judicial Code, Sec. 128, and the amount in controversy is in excess of \$1,000, a final judgment of the Circuit Court of Appeals is reviewable on error by the Supreme Court, under Judicial Code, Sec. 241, and is hence not a case reviewable on certiorari under Judicial Code, Sec. 240. *U. S. v. Beatty*, 232 U. S. 463, 467, 58 L. Ed. 686.

Certiorari to be Used Sparingly. When the whole case is presented to the Circuit Court of Appeals, although on appeal to review a preliminary injunction, the writ may issue to the Circuit Court of Appeals. *Harriman v. N. Securities Co.*, 197 U. S. 244, 49 L. Ed. 739. *Denver v. N. Y. Trust Co.*, 229 U. S. 123, 57 L. Ed. 1101. Also see, *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 60 L. Ed. 713.

Error does not lie from the judgment of the Circuit Court of Appeals to the Supreme Court in a case of conviction for summary contempt, since that is a matter of criminal law and so falling within the provisions of Judicial Code, Sec. 128; but under its discretion the Supreme Court may review the case on certiorari. *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 410, 62 L. Ed. 1186.

That this jurisdiction is to be resorted to only in cases of peculiar importance, see *Fields v. U. S.*, 205 U. S. 292, 51 L. Ed. 807; *Hamilton Shoe Co. v. Wolf*, 240 U. S. 251, 60 L. Ed. 629.

A writ of certiorari will not lie to review a judgment reversing a conviction in a criminal case. *U. S. v. Dickinson*, 213 U. S. 92, 53 L. Ed. 711.

Instructions by Supreme Court for applying for writ of certiorari are found in Secs. 3 and 4 of Rule 37 of the Supreme Court Rules; also in instructions, published by the clerk of the Supreme Court, after the enactment of the Act of September 6, 1916, 39 Stat. L. 726. Aside from the provisions of Rule 37 the requirements are as follows:

**Office of the Clerk
SUPREME COURT OF THE UNITED STATES,
Washington, D. C.**

**INSTRUCTIONS AS TO APPLICATIONS FOR WRITS OF
CERTIORARI UNDER ACTS OF MARCH 3, 1891,
AND SEPTEMBER 6, 1916.**

The following are the requirements on applications for writs of certiorari:

Petitions are docketed in this court, as _____, Petitioner, v. _____, Respondent.

Before the petition will be docketed there must be furnished this office:

(1) An original petition with written signature of counsel.
(2) A certified copy of the transcript of the record, including all proceedings in the United States Circuit Court of Appeals or other Appellate Court.

(3) An order for appearance of counsel for petitioner, signed by a member of the bar of this court.

(4) A deposit of twenty-five (\$25) dollars on account of costs.

Before submission of the petition there must be furnished:

(1) Proof of service of notice of date fixed for submission and copies of petition and brief upon counsel for the respondent. Notice of the date of submission of the petition, together with a copy of

the petition and brief, if any, in support of the same must be served on counsel for the respondent at least two weeks before such date except where the counsel to be notified resides west of the Rocky Mountains, in which case the time shall be at least three weeks.

(2) Thirty (30) printed copies of the petition and brief in support of petition, if any such brief is to be filed under one cover.

(3) At least nine (9) uncertified copies of the record, which must contain all of the proceedings in the United States Circuit Court of Appeals or other Appellate Court as well as those in the trial court. These copies may be made up by using copies of the record as printed for the Appellate Court and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up can not be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty (50) copies must be printed under my supervision in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon by counsel for petition for the submission of the petition. No oral argument is permitted on such petitions but they may be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf or on request of counsel for the petitioner, after due notice to opposing counsel and filing of such notice, the clerk may submit such petition.

If a respondent desires to oppose a petition, thirty (30) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this court who should also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

JAMES D. MAHER,

Clerk, Supreme Court of the United States.

Confusion in Law Relating to Use of Certiorari. It is very difficult, from the lawyer's standpoint, to know whether he should properly ask for review by proceedings on appeal or error or certiorari, and all three have been resorted to simultaneously and frequently application for certiorari has been made along with error or appeal proceedings. *Globe Co. v. Martin*, 236 U. S. 288, 59 L. Ed. 583; *Ohio Comn. v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004; *Central Trust Co. v. Chicago Auditorium Assn.*, 240 U. S. 581, 60 L. Ed. 811; *Bennett v. U. S.*, 227 U. S. 333, 57 L. Ed. 531; *Gompers v. U. S.*, 233 U. S. 604, 58 L. Ed. 1115. And certiorari may be granted even after motion to dismiss error or appeal proceedings, and the record on such proceedings will be made the return to the writ, in order to promote expedition. *White-Smith Pub. Co. v. Apollo Co.*, 209 U. S. 1, 52 L. Ed. 655.

Where both an appeal and an application for certiorari are before the Supreme Court and the appeal is dismissed and certiorari granted, the record on appeal will be treated as the return to the writ of certiorari. *U. P. Ry. Co. v. Wells Co.*, 247 U. S. 282, 284, 62 L. Ed. —.

Cross Writ of Certiorari. Cross writ may also be granted. *Wright v. L. & N. R. Co.*, 236 U. S. 687, 59 L. Ed. 788; *LaBourgogne*, 210 U. S. 95, 52 L. Ed. 973, in which case the court feels free to dispose of all questions appearing of record. And it is immaterial that the trial court did not have before it the questions raised in the Circuit Court of Appeals. *Friend v. Talcott*, 228 U. S. 27, 57 L. Ed. 718.

The Supreme Court will on cross writ use great circumspection in deciding the case on its merits. *Brown v. Fletcher*, 237 U. S. 583, 59 L. Ed. 1128; *Lutcher v. Knight*, 217 U. S. 257, 54 L. Ed. 757; *Cramp Shipbuilding Co. v. International Curtiss, etc., Co.*, 228 U. S. 645, 57 L. Ed. 1003.

Mandate to Trial Court. Generally the mandate of the Supreme Court upon proceedings in certiorari will issue to the court from which the Court of Appeals took the case. *Lutcher Co. v. Knight*, 217 U. S. 257, 54 L. Ed. 757.

General Cases in Which Certiorari Used. There are many cases in which the Supreme Court has taken jurisdiction on certiorari:

(a) Because of the general effect or pressing importance of the questions involved, e. g., *Montana Co. v. St. L. Co.*, 204 U. S. 204, 51 L. Ed. 444; *St. L. R. Co. v. Wabash Ry. Co.*, 217 U. S. 247, 54 L. Ed. 752; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714.

(b) Where, upon decision in the Circuit Court of Appeals, certain questions are certified to the Supreme Court. *N. W. Mut. L. Ins. Co. v. McCue*, 223 U. S. 234, 56 L. Ed. 419; *Baglin v. Cusenier Co.*, 221 U. S. 580, 55 L. Ed. 863; *Green County v. Thomas*, 211 U. S. 598, 53 L. Ed. 343.

(c) Where decisions of the Circuit Court of Appeals are in conflict. *Cameron v. U. S.*, 231 U. S. 710, 58 L. Ed. 448; *Chicago Bd. of Trade v. Christie Co.*, 198 U. S. 236, 49 L. Ed. 1031; *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 60 L. Ed. 713. For criminal case, see *Heike v. U. S.*, 227 U. S. 131, 57 L. Ed. 450. As to alleged conflict with the Supreme Court or with state courts, see *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 59 L. Ed. 705; *N. P. R. Co. v. Meese*, 239 U. S. 614, 60 U. S. 467; *Messenger v. Anderson*, 225 U. S. 436, 56 L. Ed. 1152; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 53 L. Ed. 480.

(d) Where questions of federal jurisdiction are involved. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208; *Wells Co. v. Gastonia Cotton Mfg. Co.*, 198 U. S. 177, 49 L. Ed. 1003.

(e) Where a question is involved as to the organization of the lower court under the statutes providing for the composition of a Circuit Court of Appeals. *Rexford v. Brunswick Co.*, 228 U. S. 339, 57 L. Ed. 864.

(f) On account of the great importance of patent questions involved in discordant decisions of different Circuit Courts of Appeals. *Rubber Tire Co. v. Goodyear Co.*, 232 U. S. 413, 58 L. Ed. 663; *General Fireproofing Co. v. Expanded Metal Co.*, 214 U. S. 366, 53 L. Ed. 1034.

Certiorari under Judicial Code, Sec. 262. The power to issue writs of certiorari is also conferred by Judicial Code, Sec. 262, in cases not comprehended under Sec. 240, and is intended to be resorted to only in cases where the jurisdiction has been grossly transgressed, as a corrective. *Whitney v. Dick*, 202 U. S. 132, 50 L. Ed. 963; *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762.

The writ under Sec. 262 can be used as auxiliary only, in aid of jurisdiction. *Borden's Condensed Milk Co. v. Baker*, 177 Fed. 906, 101 C. C. A. 186.

Denial of an original application to the Circuit Court of Appeals for a writ of mandamus addressed to the District Court may be reviewed by writ of certiorari, the power of the Supreme Court to issue writs of certiorari not being limited to the cases following within Judicial Code, Sec. 240. *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762.

The jurisdiction of the Circuit Court of Appeals to issue writs of certiorari is conferred also in a limited way by the provisions of Judicial Code, Sec. 262. *U. S. v. Circuit Court*, 126 Fed. 169, 61 C. C. A. 315. See also *Lovell-McConnell Mfg. Co. v. Bindrim*, 219 Fed. 533, 135 C. C. A. 283.

Certiorari may issue from the Supreme Court to the Circuit Court of Appeals under Judicial Code, Sec. 262, to review an interlocutory judgment which, because the case is ultimately appealable, is not subject to certiorari under Sec. 240. *U. P. Ry. Co. v. Weld County*, 247 U. S. 282, 62 L. Ed. —.

"We do not overlook Sec. 262 of the Judicial Code, formerly Sec. 716 of the Revised Statutes, which empowers this court to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. No doubt, this provision contemplates the employment of the writ of certiorari in instances not covered by Sec. 240 and affords ample authority for using the writ as an auxiliary process, and, whenever there is imperative necessity therefor, as a means of correcting jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways (citing authorities). But it must not be used under this provision as a substitute for an appeal or writ of error to correct mere errors committed in the exercise of a lawful jurisdiction." *U. S. v. Beatty*, 232 U. S. 463, 467, 58 L. Ed. 686. See *In re Chetwood*, 165 U. S. 44, 462, 41 L. Ed. 782; *Whitney v. Dick*, 202 U. S. 132, 50 L. Ed. 963; *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762; *Meeker v. Lehigh Co.*, 234 U. S. 749, 58 L. Ed. 1575.

No. 1955.**Affidavit to Petition to the Supreme Court for Writ of Certiorari.**

State of —,

County of —, ss.

R. Y., being duly sworn, says that he is one of the counsel for C. D., the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

R. Y.

Subscribed and sworn to before me by R. Y. this the — day of —, A. D. —. My commission expires —.

[Seal.]

J. H.,

Notary Public, — County, —.

No. 1956.**Petition for Writ of Certiorari in Personal Injury Case.**

The Supreme Court of the United States, October Term, 1902.
Northern Pacific Railway Company,
Petitioner,

vs.

Louise H. Adams and Frank H.
Adams.

To the Honorable the Supreme Court of the United States.

The petition of the Northern Pacific Railway Company respectfully shows to this honorable court as follows:

Louise H. Adams, widow, and Frank H. Adams, son, of J. H. Adams, deceased, seek in this action to recover damages against the Northern Pacific Railway Company for the death of J. H. Adams. The action was brought in the District

Court for the District of Washington, the jurisdiction of which court was based on diverse citizenship.

The trial resulted in a verdict for the plaintiffs below and judgment for \$14,000 was entered on the verdict December 14, 1900. (Transcript p. 80.) Upon the pleadings and a bill of exceptions duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the ninth circuit, which court on May 19, 1902, affirmed the judgment.

The death occurred in the state of Idaho, and *though no statute of that state was pleaded or introduced in evidence*, it is sought to sustain the recovery by a statute of that state reading as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The grounds of negligence relied on were two.

a. That the defendant (this petitioner) having accepted the deceased as a passenger on its westbound train at Hope, in the state of Idaho, ran the train at so high a rate of speed around curves as to throw the deceased off a platform while he was passing from one car to another.

b. That one of the cars in the train was provided with no vestibule, the remainder of the train being vestibuled, whereas it was alleged that the railway company had advertised the trains as a vestibuled train.

The petitioner, besides denying negligence in either of the particulars alleged, set up a further defense that the deceased was, and for a long time had been, the attorney of various railway companies (but not of the petitioner) and was a *gratuitous* passenger, traveling on a free pass issued to him

as such, endorsed on which was the following contract executed by him.

“Conditions.”

“This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

“The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

“I accept the above conditions.

“Jay H. Adams.”

“This pass will not be honored unless signed in ink by the person for whom issued.”

The trial court on motion and demurrer struck out the portion of the answer last referred to, holding that, while the contract on the pass made in the state of Washington where the action was brought and where such contracts had been held binding (*Muldoon vs. Seattle City Ry.*, 7 Wash. 528) might have bound the deceased as to any damages *he* might have sustained from personal injury, it could not bind his widow and son with respect to the damages *they* may claim under the statute.

With respect to the alleged negligence of the railway companies which is claimed to have been the cause of death, the essential facts are as follows:

The deceased had lived for many years in Spokane, state of Washington; had been a lawyer by profession and the attorney of several railway companies; in the trial of cases and in other work for these companies he traveled much of his time on petitioner's railway, and on other railways in that section; he was very familiar with such travel.

On November 13, 1898, he, with a friend, went on a North-

ern Pacific train from Spokane to Hope, Idaho, about 85 miles distant, on the main line of the Northern Pacific road; after remaining several hours at Hope, they returned on the westbound overland train, which was about three hours late; deceased and his friend went into the train together. It is an established and uncontradicted fact that they got onto the train by one of the unvestibuled platforms (Transcript p. 98, 494). They went forward into the smoking car.

The train consisted of an engine and eight cars, in the following order, viz.: Engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, standard Pullman sleeper (Transcript p. 386).

All the cars in this train were vestibuled, except the one known as a "tourist sleeper," placed immediately in front of the dining car, which was not so equipped, but had open platforms, like an ordinary passenger coach; that is, with hand railings running along the end of the body of the car and end of the platform down to the steps and about two and a half or three feet high (Transcript p. 86).

Shortly after leaving Hope, Mr. Adams rose from his seat in the smoking car, leaving his overcoat, and said he was going back to the dining car for some cigars (Transcript p. 91). His friend never saw him afterwards. The testimony, however, shows, and it is not questioned, that Mr. Adams passed toward the rear end of the train, through the day coach and through the tourist sleeper, across the open platforms thereon and into the dining car (Transcript p. 481). After buying some cigars in that car Mr. Adams went forward; at this time the train was going at a fairly good speed over a track with many curves (Transcript pp. 482-3), and Mr. Adams is shown to have had difficulty in keeping his balance in the aisles of the car (Transcript pp. 481, 484). After this no one is shown to have seen him before his death. His body was found the next day opposite a curve in the railroad track and about 35 or 40 feet therefrom, at a point about six and a

half miles west of Hope. His body when found was mutilated in a manner which indicated quite clearly that he had fallen from the train.

Your petitioner contends that the speed of the train was ordinary, such as was frequently and customarily made over this portion of the road. (Transcript pp. 310-311, 316-317.)

One of the grounds on which the jury was allowed by the charge of the trial court to render verdict against your petitioner was, the want of a vestibule on the car in question. Vestibules strengthen a car (Transcript p. 546); are aids in preventing telescoping (Transcript p. 561); they keep the cars warm in winter (Transcript p. 564) and make passage from one car to another more comfortable, protecting from the elements and from cinders, sparks and dust. As one of the witnesses said, they would make the crossing the platform safer for a child or decrepit person (Transcript p. 601). The vestibule appliance makes a train more attractive in appearance and more comfortable. It is highly advertised, reduces some dangers and increases others (Transcript pp. 616, 624). The vestibule is a comparatively new device, having been in more or less general use since 1892 (Transcript p. 571). But the record shows that in 1898 the percentage of vestibuled passenger equipment on different prominent systems of the country was very small, and that generally unvestibuled cars were placed, when convenient or necessary, in almost all passenger trains.

On your petitioner's road one to three or more unvestibuled tourist sleepers had for many years been run daily and had been placed in the train just ahead of the dining car (Transcript p. 392). It is undisputed that Mr. Adams had, for a number of years prior to his death traveled a great deal on the Northern Pacific road and other roads, and that probably every one of the Northern Pacific trains on which he had traveled had had one or more unvestibuled cars (Transcript p. 653).

The record shows that the deceased boarded the train on an unvestibuled platform, and in going back to the dining car passed over two such platforms, one on each end of the tourist sleeper. This established the fact of his knowledge of their character, it being broad daylight, and consequently the court instructed the jury that he *must have known thereof* (Transcript p. 820).

By the charge of the court the jury was allowed to find your petitioner negligent either (a) with respect to the speed of this train or (b) with respect to the unvestibuled character of the tourist car platform.

Your petitioner insists that the case should not have been allowed to go to the jury on either ground, and further, that because of the contract made between deceased and the railway company upon which he was being carried at the time, his heirs cannot maintain this action.

Your petitioner has no right of appeal or writ of error herein to this honorable court, because the jurisdiction of the District Court depended entirely on diverse citizenship. The Circuit Court of Appeals stayed its mandate until the third Monday of October to give time for the presentation and determination of this petition. Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions involved and a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the ninth circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that court "Northern Pacific Railway Company, plaintiff in error *vs.* Louise H. Adams and Frank H. Adams, defendants in error," to the end that said cause may be reviewed and determined by

this court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

Northern Pacific Railway Company,
By C. W. Bunn,
Attorney.

(1) Writ was granted in this case. N. P. Ry. v. Adams, 192 U. S. 440, 48 L. Ed. 513.

No. 1957.

Petition for Writ of Certiorari in Patent Case from the Supreme Court to the United States Circuit Court of Appeals for the Third Circuit.(1)

The Supreme Court of the United States,
No. —, October Term, —.
The Carnegie Steel Company Limited,
Petitioner,

vs.

The Cambria Iron Company, Respondent.

To the Honorable, the Judges of the Supreme Court of the United States.

Your petitioner, the Carnegie Steel Company, Limited, respectfully shows:

That on the 2d day of December, 1895, the complainant, the Carnegie Steel Company, Limited, brought its complaint against the respondent, the Cambria Iron Company, for infringement of a United States patent No. 404,414, and granted to William R. Jones, June 4, 1889 (of which petitioner is assignee), for a method of mixing molten pig metal in such a way as would complete the continuous process of making

Bessemer steel in direct connection with the blast furnace. The case was heard before the Circuit Court, and on the 5th of September, 1898, the opinion of the court was filed, fully discussing all the points of the case and holding for the complainant on all the points at issue.

The Circuit(2) Court found affirmatively:

- (a) This process was patentable.
- (b) It was not anticipated by the prior efforts to the same end.
- (c) It was of vast utility and public importance, as it quickened and cheapened the production of steel.
- (d) That defendant used the process and therefore infringed.

The case then went to the Circuit Court of Appeals and on the 21st of August, 1899, the court filed its opinion and ordered the decree of the Circuit Court reversed and the case remanded to that court with direction to dismiss the bill of complaint.

The Circuit Court of Appeals decided that the respondent did not infringe. And while the court did not directly traverse the first three findings of the court below, it so modified them as to leave very uncertain the results of a long and expensive litigation which results concern large interests and many people.

In order that this honorable court may understand the grounds on which this petition for a *certiorari* is based, the following statement of facts, condensed from the opinion of the Circuit Court, is submitted.

Since 1856, when Bessemer gave the world his method of converting molten pig metal into steel by air blasts, the genius of the art, following his suggestion as to its desirability and economy, diligently sought a method of using the molten metal directly as it came from the furnaces without the loss of its heat and without the necessity of re-handling.

While everybody saw the desirability of such a method and many practical attempts were made to reach the result; they

all failed, until Jones invented the process which is the subject of this proceeding.

Prior to this invention of Jones and its practical employment at the Edgar Thomson Steel Works, the respondent, as well as others, used the intermediate cupola furnace, and thence conveyed to the converter to be made into steel by the Bessemer process. Jones eliminated the whole intermediate cupola process by inventing a method of mixing the metal while passing through a receptacle called a mixer throughout the case, as it came in molten condition from the blast furnace, so that it could be directly conveyed, still molten, to the converters. This made practical the direct process and accomplished the great end sought in the art.

The reason molten pig metal could not be used directly from the furnace without mixing by the Jones process, or without going through the circuitous, tardy and expensive cupola process is this:

Molten pig metal, in the percentage of its non-metallic constituents (silicon, carbon, etc.,) varies greatly. This variation appears not alone as between different furnaces, but is quite as marked as between successive withdrawals from the same furnace. As the air blast in the converter must be regulated to correspond with the quantity of silicon, carbon, etc., contained in the charge (these being the elements operated upon by the blast to effect the purification of the metal which is the heart of the Bessemer invention) and as there is no way of discovering the extent of their presence, except by the eye while the operation is in progress, notwithstanding all the skill obtainable, great quantities of steel are lost, and much inferior steel is made by the wide fluctuations. Jones' process obviates this trouble by filling a receptacle (the mixer) almost full of molten metal drawn from different furnaces, or from the same furnace at different times, which are not uniform in their chemical composition, thus creating a composite body of metal. From this composite body of metal are taken portions for use in the

converter which represents the average of the non-uniformity of all the parts, and as withdrawals are made, fresh portions are added successively so that at all times the receptacle contains a pool which dominates or controls the parts as stated.

Uniformity has been the aim of most other processes, but the Jones process was based upon the idea that uniformity was not essential, but that a non-abrupt, non-uniformity, which was the outcome of the Jones process, produced the whole result desired. This theory was reduced to practice by Captain Jones. After that, everybody, as is usual in such cases, began to discover that they had always known it.

Your petitioner exhibits, as part of the application, a certified copy of the record, of the decree of reversal, and the opinions of the said Circuit Court and of the Court of Appeals.

Upon this statement of facts and the record in the cause, the petitioner submits the following reasons why the judgment of the Circuit Court of Appeals reversing the decree of the Circuit Court, and remanding the cause to the court with directions to dismiss the petitioner's bill, should be brought here for review by this court:

First. Because of the great importance of the case as to the public and the parties.

It is of the same range and importance as Bessemer's original invention and as Mushet's re-carbonization process, and completes the series necessary for the cheap production of steel.

There should be a speedy and certain decision upon the vital questions involved in this case. The patent covering a radical process in the art of steel making as it is now practiced throughout the civilized world, should be definitely adjudicated upon the question of its validity, without compelling the complainant to renew, with respect to some other defendant, the litigation that has consumed so many years, and, as the voluminous record discloses, was so thoroughly and exhaustively tried. The decision of the Circuit Court of Appeals being definite only upon the question of infringement, and be-

ing predicated as it is upon a misconception of the binding effect of an alleged stipulation, on the question of infringement, has only determined that one fact in respect to this one defendant, reference to the other questions, in so far as they are referred to in the opinion, not being followed out to any logical and decisive conclusion.

Second. Because the Circuit Court of Appeals erred in the interpretation of the second claim of the patent in this, that the said court decided there was nothing in the patent to warrant the determination that the inventor had in mind that the residue to be left in the receptacle should form a dominating pool, while the proceedings in the patent office, cited by the court, and the patent itself, assert the contrary thereof.

Third. Because the Circuit Court of Appeals found that the defendant did not infringe the second claim of the patent in suit.

Fourth. Because the Circuit Court of Appeals erred in reaching its conclusion as to infringement in considering, and in considering alone, the effect of an alleged stipulation in the case respecting defendant's use of petitioner's process, which stipulation had been repudiated for mistake before closing the case, and had been waived as to its essential features by both parties to the case.

Fifth. Because the Circuit Court of Appeals failed to follow or to give force or effect to the rulings and decisions of this court on the legal propositions involved.

Sixth. Because, under the circumstances heretofore stated, a full consideration of the case by this honorable court will tend to prevent costly and undesirable litigation, and promote justice to all interested.

Wherefore, in view of the premises, petitioner prays that this honorable court will grant its writ of *certiorari* directed to the Circuit Court of Appeals for the third circuit, requiring that the record of said cause in the said court and its decree be certified to this court, and that this honorable court will

thereupon proceed to correct the errors complained of, reverse the said decree and remand the said cause, and give to your petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

The Carnegie Steel Co., Limited,

Thomas B. Reed,

James Gayley, Manager.

Philander C. Knox,

of Counsel.

- (1) Writ granted in 175 U. S. 727, opinion on merits in 185 U. S. 403.
 (2) "Circuit Court" would now be "District Court," 36 Stat. L. 1167; Judicial Code, Sec. 291; Ex parte U. S., 226 U. S. 420, 57 L. Ed. 281; Wogan v. Amer. Sugar Refining Co., 215 Fed. 273.

No. 1958.

Petition for Writ of Certiorari in Patent Case from the Supreme Court to a Circuit Court of Appeals.

The Supreme Court of the United States,
 October Term, A. D. 1901.

The Singer Manufacturing Company,
 Petitioner.

vs.

Herman Cramer, Respondent.

Petition for Writ
 of *Certiorari*, etc.

Petition for writ of *certiorari* to the United States Circuit Court of Appeals for the ninth circuit, to require said court to certify to the Supreme Court of the United States for its review and determination the case of The Singer Manufacturing Company, plaintiff in error, vs. Herman Cramer, defendant in error.

To the Honorable the Supreme Court of the United States:

Your petitioner, The Singer Manufacturing Company, respectfully petitions this honorable court that the writ of *certiorari* may be granted, directing the Circuit Court of Appeals for the ninth circuit to certify to this honorable court for its review and determination, the case of your petitioner, plaintiff

in error, *vs.* Herman Cramer, defendant in error, and for reasons therefor respectfully shows to this honorable court as follows:

STATEMENT OF FACTS.

First. Your petitioner is a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and having its principal place of business in the city, county and state of New York; and that the defendant in error, Herman Cramer, is a citizen of the state of California and resident thereof.

Second. That the said Herman Cramer filed his complaint against your petitioner in the Circuit Court of the United States for the northern district of California at the July term of court in the year of 1896, for an infringement of letters patent granted him under date of January 30, 1883, and numbered 271,426, for a new alleged useful improvement in sewing machine treadles, infringement being alleged only as to the first claim thereof (Record, pp. 1-5), but that in due order of pleading thereafter your petitioner filed a plea of the general issue to said complaint and gave notice in writing of the defenses to be urged in the trial of said case in compliance with the statutes in such case made and provided.

Third. That said case came on for trial on the 28th day of March, 1900, and upon the 20th day of April, 1900, a verdict and judgment was rendered against your petitioner and in favor of the defendant in error for the sum of \$12,456 and costs. That a bill of exceptions was duly filed in said cause and a writ of error was allowed. The said writ of error being issued on the 8th day of June, 1900, and served upon the attorney of the defendant in error on the 9th of June, together with the citation, citing and admonishing the defendant in error to appear in the said Circuit Court of Appeals and show cause why the said judgment should not be corrected, and that under said writ of error, the said cause was properly brought before the Circuit Court of Appeals for the ninth circuit for

review and determination; and that upon the 1st day of September, 1900, a certified transcript of the record and all proceedings of the said court in said case was filed in the Circuit Court of Appeals for the ninth circuit and the said case was duly entered and docketed in said Circuit(1) Court and entitled the said The Singer Manufacturing Company, complainant in error, *vs.* said Herman Cramer, defendant in error. A certified copy of the entire record of the case in the Circuit Court of Appeals is hereby furnished in conformity with rule 37 of this honorable court relative to cases from Circuit Courts of Appeals, and the same is hereby referred to and marked and identified herewith and made a part of this petition. The said certified printed copy of said entire record of the proceedings in said Circuit Court, including the bill of exceptions, contains all the testimony that was taken upon trial of said case in said circuit. The assignment of errors that was filed by your petitioner contained in said bill of exceptions and they are shown and exhibited upon said pages 811 to 845, inclusive, and are hereby referred to and made part of this petition and application.

Fourth. That the said case came on to be heard in the said Circuit Court of Appeals upon the 5th day of March, 1901, before the Honorable Circuit Judges Gilbert and Ross and the Honorable District Judge Hawley, and upon the 13th day of May, 1901, the said Circuit Court of Appeals rendered a judgment affirming the said judgment of said Circuit Court; that said Circuit Court of Appeals filed an opinion and decision in writing, the closing paragraph of which contained an order that the judgment of the Circuit Court must be affirmed with costs; said opinion and decision are contained in the certified copy of the record of the said Court of Appeals at pages 854 to 869, inclusive, and the same is hereby referred to and made a part of this petition. That shortly thereafter your petitioner filed a petition for rehearing, and that upon the 15th day of November, 1901, said petition was denied by the said

Circuit Court of Appeals for the ninth circuit, but the mandate in said case has been stayed until the 15th day of January, 1902, for your petitioner to file this, its petition for writ of *certiorari*.

Fifth. Your petitioner is advised and so believes that the said judgment and finding of the said Circuit Court of Appeals in the said cause in sustaining the judgment of the court at the circuit; and the judgment of the court at the circuit, are erroneous, without legal justification and contrary to all the rules, decisions and principles of law laid down by this honorable court and found upon the statute books applicable to such causes; and that this honorable court should require the said case to be certified to it for its review and determination under and in accordance with the sixth section of the Act of Congress, entitled "An Act to Establish Circuit Court of Appeals," and to define and regulate certain cases, the jurisdiction of the courts of the United States and for other purposes, approved March 3, 1891(2), the said case being made final in the Circuit Court of Appeals by said Act, except for the interposition and rightful recognition by this honorable court as herein prayed.

Grounds and gravamen of and for this petition for writ of certiorari—aligned and epitomized.

First. This petition should be granted because the exact and precise subject-matter contemplated by this petition, namely, the validity of the Cramer patent of January 30, 1883, No. 271,426, for an alleged improvement in sewing machine treadles, and the question of infringement thereof by petitioner, has been before three several Circuit Courts upon three separate trials in actions at law, before three several respective juries, and against petitioner's same mechanical devices in each suit, and the patent so construed in each case as to bar any finding, otherwise than of non-infringement.

In two of such cases, namely, the case of *Cramer vs. Fry*,

your petitioner's agent, tried before his honor, Judge Joseph McKenna, and the case of Cramer against your petitioner, tried in the first instance before his honor, Judge James H. Beatty, the patent was construed by the court, your petitioner's device found not to infringe, and the jury instructed to return a verdict for your petitioner.

In the trial of the above case against your petitioner the instruction of the court, Judge Beatty, to the jury to so find, was based primarily upon the proposition that your petitioner openly defended its agent Fry and was protected by the judgment, but your petitioner's motion before his honor Judge Beatty to instruct the jury to find for your petitioner, was based not only upon the fact that your petitioner had defended its former agent, Willis B. Fry, in the action of the respondent, Cramer, against him, but upon the same ground as appears by the instruction of Judge McKenna, namely, that your petitioner did not infringe; and his honor Judge Beatty construed the patent as it was construed by Judge McKenna and independently of Judge McKenna's construction, and would have so instructed a verdict for petitioner in the case before him, if he had not ordered a verdict for your petitioner upon the ground just indicated — as appears by the following quotation from the records of the United States official reporter, Mr. Clement Bennett, now on file in said case, as follows:

"The Court: I take it from the evidence already offered, that this is the same case tried before. My mind is made up upon that. If the record does not show that, you might be permitted to show it. But I have made up my mind that this is the same case that was tried before. I have looked over the old case, and think the patents introduced there are the same as those introduced here. The same evidence is introduced here that was introduced before. I could not well determine that without going over the whole evidence. . . .

"Mr. Wheaton: The decision of Judge McKenna is upon file, and I wish to put that in also.

"The Court: Yes, I think it is on file. I may suggest that while I have decided this question simply on what I deem to be the law applicable to it, uninfluenced by that decision, yet if you went through with the trial of the case and introduced all your evidence, I do not see what I could do but to instruct the jury finally to find a verdict for the defendant, and thus reach the same conclusion we reach by the introduction of this judgment roll."

The "judgment roll" here referred to by Judge Beatty being the judgment on verdict for your petitioner instructed by Judge McKenna upon the ground of non-infringement. (Record, p. 667.)

In the trial of the present case before his honor Judge Morrow, his honor Judge Morrow agreed with Judge McKenna that the Cramer patent in suit was a narrow patent, and with the views of his honor Judge McKenna upon this proposition, the exact language of Judge Morrow to this effect being as follows:

"Judge McKenna in that case held that this was a narrow patent. I concur with his views upon that proposition." (Record, p. 740.)

Your petitioner respectfully submitting that it is the veriest travesty upon every rule of construction laid down by this honorable court as governing and interpreting letters patent to find that the Cramer patent in suit was a narrow patent, and so finding, to permit any question of infringement thereof to be submitted to any jury, the identification of the patent as a narrow one leaving no question of fact possible to go to the jury as against your petitioner's device proceeded against, being a device of the same precise character and construction present in each of the three cases and trials, your petitioner averring that in no other case or cases except the three separate trials in the Circuit Court of the United States for the northern district of California before his honor Judge McKenna, his honor Judge Beatty, and his honor Judge Morrow, has the

validity of the Cramer patent been at issue or passed upon, or any question of infringement decided in relation thereto, excepting further, of course, this case in the Court of Appeals.

Second. The vast sums of money claimed to be due by the respondent Cramer of your petitioner by reason of this patent and the jury verdict in this case, and the peril to your petitioner's entire property, assets and business, under claims made by reason of this jury finding, would seem to make this petition worthy of consideration at the hands of this court upon this ground alone, as a matter of gravity and importance; certainly so to your petitioner.

The judgment in this case, it is true, is only for the sum of twelve thousand four hundred and fifty-six dollars. This judgment, as appears by the record, covers only asserted acts of infringement committed in the northern district of California and within a certain prescribed time. Since the rendition of such judgment the respondent Cramer has brought five additional actions at law against your petitioner: One in the Circuit Court of the United States for the northern district of California; one in the Circuit Court of the United States for the district of Washington; one in the Circuit Court of the United States for the district of Oregon; another in the Circuit Court of the United States for the southern district of California; and still another in the Circuit Court of the United States for the southern district of New York, confining the allegations of acts of infringement to the respective districts. The aggregate amount of damages asked of your petitioner in these suits under this patent, closely approximating two millions of dollars, your petitioner averring that the declarations or complaints in these five suits, respectively, are printed in form and that the counsel for said respondent in all of these declarations or petitions openly threatens to bring separate and independent suits in every district of the United States against your petitioner for damages for the infringement of said Cramer patent, confining each allegation of infringement as committed in each

separate district, and to put your petitioner to trial of as many cases as there are districts in the United States. Your petitioner averring that in each of the printed declarations or complaints so filed against your petitioner as aforesaid, there is contained the allegation and averment in substance and conclusion that in the above and pending case in which this petition for writ of *certiorari* is filed, all facts of the validity of the patent in suit have been adjudicated against your petitioner and all facts as to the infringement of said patent so adjudicated, and that there is nothing left but to assess the claimed damages against your petitioner as fixed and found by the jury in the action in which this petition is presented. And, further, that said respondent Cramer in each of said declarations or complaints filed against your petitioner since the entry of the judgment verdict in this case asks and demands three times the amount of the damages found by the respective juries, besides the costs of the respective suits, plainly amounting, if such demands are recognized and enforced, to a sum equal to many millions of dollars, a substantial proportion of the entire property assets of your petitioner.

Third. Your petitioner further respectfully submits that this petition should be allowed because manifestly and plainly upon a study and examination of the Cramer patent in suit and upon the face of the patent itself and the first claim thereof alleged alone to be infringed by your petitioner, and a comparison of this patent with the combined cross-bar, vertical brace, loop and treadle casting and arrangement of your petitioner as shown by the Diehl patent; there can not be possibly found or exist any infringement by your petitioner of the first claim of this patent.

Your petitioner takes it that this Cramer patent is directed to the sewing machine manufacturing industry and must be intended to be understood by those carrying on that industry. The statement and terms of the patent are perfectly plain and apparently easy to understand, and your petitioner understands

and believes that every other sewing machine manufacturer in the United States would so understand and nothing otherwise than that this Cramer patent related to a particular and peculiar mechanical construction and arrangement of treadle and alliance therewith through certain peculiarities of formation, with holes in the lower depending ends of the cross-brace of the sewing machine to serve as bearings. Every sentence and line of the patent emphasizes and makes certain this fact and condition and the first claim points out with great particularity the specific construction and arrangement necessary to meet and conform with the statements in the specification part of the patent and illustrated in the drawings. There can certainly be found nothing to a sewing machine manufacturer to indicate that this Cramer patent or its patentee had any thought or idea, purpose or object, or considered the invention of his patent otherwise than a specific detail construction and arrangement of parts allied together as set forth in the specification and particularized and pointed out and made certain in the claims, and as so identified in this Cramer patent. There is found totally absent in your petitioner's sewing machine construction every element or part, both as to function and result, going to make up the first claim of the Cramer patent, there being absent from your petitioner's device any holes or openings whatever through the lower end of your petitioner's cross-brace to serve as bearings for any purpose, there being totally absent from your petitioner's device any treadle of any description fitted to oscillate in any bearings whatever, except your petitioner's screw-point centers in your petitioner's treadle itself, your petitioner's treadle being as a matter of fact hung in offsets in the old common cross-bar and such cross-bar, then united as a single casting with the old common double vertical brace.

The Cramer patent in suit is found as "Exhibit A" upon Record, pp. 63, 64; and the Diehl patent, admittedly representing petitioner's machine in all three of the separate trials and cases, is found upon Record, pp. 166, 167, 168. The file-wrap

per and contents of the Cramer patent being found upon pp. 365 to 376, inclusive, of the Record.

Fourth. Your petitioner further urgently submits and contends that this petition should be granted because the file-wrapper and contents of the respondent Cramer's patent so defines and limits this alleged invention of Cramer as set forth and elucidated in the opinion of his honor Judge McKenna that there can be no possible construction given to this Cramer patent by reason of the statements and proceedings disclosed by the file-wrapper and contents, as to authorize or permit the finding that your petitioner's device infringes the first claim of said patent.

As to the matter just indicated your petitioner alleges that he is informed by counsel supposedly learned as to such matters, and so believes, that the statements of the respondent Cramer and of his patent solicitors in the various proceedings in the Patent Office relating to his alleged invention before the grant of the patent and as a part thereof so identifies and defines and makes certain all there is or can be to this supposed Cramer device and invention, that so understanding the same there can be no possible contention that the device of your petitioner bears any relation to said first claim or can by any possible rightful construction put upon it infringe the same. Your petitioner can not from any reading or understanding of the so-called file-wrapper and contents of the patent as appearing in said papers themselves and as set forth in the opinion of Judge McKenna, see or understand how any conclusion as to matters of equity, mechanical facts, and application, can be arrived at, otherwise than appears in the careful and extended decision of his honor Judge McKenna, and by the concise statement of this fact and finding by his honor Judge Beatty.

The decision of Judge McKenna, with the Cramer patent and specification printed therein in full and an illustration of defendant's machine alleged to infringe said patent, being found in the case of *Cramer vs. Fry*, 68 F. R., 201-212 inclusive.

The fact being in brief, as your petitioner understands and believes, that there is a direct conflict of opinion and finding as to the construction of respondent Cramer's patent between Judges Gilbert, Ross and Hawley upon the Court of Appeals; Judges McKenna, Beatty and Morrow at the Circuit, and two of said judges at the Circuit, Judges McKenna and Beatty, construing the patent and finding that under such construction there can be no possible infringement; one of said judges, Judge Morrow, construing the patent as narrow and then illogically and unjustifiably submitting the question of infringement to the jury, and three of said judges, Gilbert, Ross and Hawley upon the Court of Appeals, construing said patent as broad and basic and finding infringement thereof.

Fifth. The petition should be granted because the testimony shows that neither respondent Cramer nor his business suffered any damage or injury whatever, by reason of any act of asserted infringement of your petitioner; and that as a matter of fact in the sale of petitioner's sewing machines in the northern district of California prior to and during the time the respondent Cramer claims he was damaged, such sale was of great advantage to said respondent Cramer and his alleged invention, if that invention was of the slightest practical value.

The testimony of the respondent Cramer and that of his only supporting witnesses, his son and daughter, shows that Cramer upon two occasions only had made castings of the treadle devices of his patent, the first set of such castings being four or five in number, being made in the year 1881 (Record, p. 160), the second set of such castings being made in the year 1883 (Record, 158); that Cramer himself never made sewing machines, and the only use he ever made of his invention or these castings was to take out the usual braces found in second-hand sewing machines of different manufacturers and to substitute therefor his patented braces (Record, p. 81 and p. 160); that he "got or charged five dollars more" for the second-hand machines in which he put his patented braces and that he paid from

five dollars up for such second-hand sewing machines; that he had used up all of his last set of castings and all of his castings by the year 1884 or 1885 (Record, 83); that he only sold altogether "*between twenty-five and forty machines*" with his patent brace. (Record, p. 151.) There is no proof in the record from any party to whom he ever sold any sewing machine with his patented brace thereon, nor was any such sewing machine produced at any of the trials. It is true that Cramer did swear that he continued to put in his patent brace until your petitioner came up into that part of the country and drove him out with their machines, which he now asserts is an infringement of his patent; but it is perfectly evident that this statement of Cramer was a mere bald conclusion and not a statement of fact and was made solely for its influence upon and to the jury. The undisputed facts show that between the years 1881 and 1885 Cramer by his own statement never had by his two acts or sets of castings, one at San Francisco and one at Sonora, more than thirty-five or forty of his patent treadles. As to the first set he swears he put them in and they were disposed of within a few weeks; as to the second set of casting there can be nothing more certain than that such casting were incorporated in second-hand machines through the years 1882, 1883 and 1884, and no other attempt was ever made by Cramer to utilize his invention; manifestly because there was no demand for such a device, and its utilization would have been impossible under any circumstances other than by the forced alliance by said respondent Cramer of his patented device with second-hand machines purchased by him, and whether or not he sold such machines for five dollars more than otherwise is based entirely upon his own statement twenty years after the event without the slightest corroboration from any party ever purchasing or using any such second-hand revamped machine from him. The fact being that your petitioner never sold or had one of its sewing machines now claimed as an infringement in the state of California until nearly two

years after Cramer had ceased or had put in the last of his patented braces. (Record, pp. 541-542.)

The fact being also that between the years 1881 and 1885 (the time when Cramer says he was putting in his forty cast braces in old machines) the Singer Company sold thousands of sewing machines in his county, with braces and treadles independent; and thus furnished a market for Cramer's brace if it was of any value.

Sixth. Your petitioner urges also that good ground exists for the granting of this petition because there is present two claims in the Cramer patent in suit, the first only alleged to be infringed, and admittedly by Cramer the asserted forty braces made and put in by him between 1881 and 1885 in second-hand sewing machines, contained the inventions of both claims, and there is no proof in this record to show that "the five dollars got or charged" by him for his brace so put in related to the mechanism of the first claim more than the mechanism of the second claim, thus leaving no guide or rule whatever for the jury verdict.

It certainly appears by the terms of the Cramer patent that a mechanism represented by the first claim would be practically worthless and unsalable unless supplemented by the mechanism of the second claim, because this mechanism "prevents the noise which would result were the "trunnions permitted to bounce and thump endwise when the treadle is in motion." It is not contended that your petitioner's sewing machine infringes this second claim, and by the admissions of the patent it would seem to follow that the devices of the first claim were worthless in a sewing machine without the controlling devices allied therewith pointed out in the patent in the second claim; and your petitioner therefore contends that there is absent from this record all proof as to any damage done the respondent Cramer or any rule of proof under which any damage could be assessed upon the evidence as submitted by the respondent himself as to this matter.

Seventh. Your petitioner respectfully submits that this petition should be granted and your petitioner relieved from this judgment and the incalculable damage that will follow from it, as above indicated, because the hanging of your petitioner's treadle upon point center screws in an off-set in the cross-bar of your petitioner's machine as combined with the band wheel loop and brace, as shown by the Diehl patent of October 14, 1894, No. 306,469, is a mere accident and incident of construction with no other object or purpose than to utilize a unit, concrete, casting structure, carrying the treadle and band-wheel, and assuring a desired alignment and fixed relation between these moving parts.

The undisputed testimony in this case shows that up to a certain time, namely, about the year 1886 or 1887, as to its sewing machines sold in California, your petitioner hung the treadle in the usual way in the legs of the sewing machine, and in the manner substantially shown in its present construction upon point center screws; that some time before the date last given one of its foremen in its manufacturing department, Mr. Philip Diehl, made the invention represented by the Diehl patent above and placed it thereafter in the sewing machine stands of your petitioner, contending that his invention was one largely belonging to the art of the casting of iron, and that it had for its object, as a matter of fact, and as shown by the patent and repeatedly stated therein, to provide a casting for containing and supporting both the band-wheel and treadle, so that when the band-wheel with its driving crank and the treadle have been hung within this casting and connected by a suitable pitman, their adjustment to, and relationship with, each other, are practically permanently secured, your petitioner respectfully submitting that such construction does not and cannot bear any relation to the mechanical device of the Cramer patent in suit, either as to the objects of the device itself or the described and patented means for carrying out such object.

Eighth. The petition should be granted because the alleged

invention of the respondent Cramer, as claimed by himself, namely, the hanging of sewing machine treadle in the cross-brace, is without any practical value, advantage or utility, and is so shown by the testimony.

The testimony of the respondent Cramer in this case and of all the witnesses, shows that aside from your petitioner, with one or two minor exceptions, all of the principal sewing machine manufacturers of the United States hang their treadle independent of the cross-brace and usually at the low ends thereof directly in or upon the legs of the sewing machine, and that this is the preferred mechanical arrangement for so doing and has been for a third of a century past, and that such location of the treadle is the most satisfactory and practical mechanical construction and arrangement shown. The respondent Cramer admitted the main fact upon the stand (Record, pp. 163-164), and the principal representatives of the different manufacturers of the United States so testified (Record, pp. 502, 547, 565), and as entirely confirmatory of the truth of this statement, your petitioner states that since the expiration of the Cramer patent some two years ago none of the sewing machine manufacturers of the United States have altered or changed the manner of hanging their treadle in or upon the legs of the sewing machine in the slightest respect.

Ninth. This petition for writ of *certiorari* should be granted because the defense by your petitioner of its agent Fry, in the Cramer-Fry suit, tried before and decided by his honor Judge McKenna by an instruction to the jury to find for the defendant upon the ground of non-infringement — was an open defense made by your petitioner wherein your petitioner paid all costs of such litigation and counsel fees, and such facts were known by respondent Cramer's counsel in that case, as appears by positive proof shown and offered in this case.

As we have above shown, his Honor Judge Beatty upon the first trial of this case against your petitioner instructed the jury to find for your petitioner upon the ground primarily that your

petitioner was back of and defended its agent Fry, and the patent being the same and the alleged infringement being the same in that case as in the case against Fry, the matter was *res adjudicata* as to your petitioner. The Court of Appeals, however, for the Ninth Circuit reversed this finding because in their opinion it was not shown that the defense by your petitioner of its agent Fry was an open defense and known to respondent Cramer. Thereupon your petitioner filed its petition for writ of *certiorari* from this decision directed to this honorable court to the October Term, 1898, upon the ground that upon the record as made and then present, the fact was disclosed and made clear that your petitioner defended its agent Fry openly to the knowledge of the respondent Cramer — but the petition was denied by this honorable court without opinion given therefor, but as your petitioner understands upon the point made by respondent's counsel in submitted brief, that only judgments in Circuit Courts of Appeal can be reviewed in this court by writ of *certiorari* when such judgments are final, within the meaning and intent of section 6(2), of the act authorizing the granting of writs of *certiorari*, and that the decision of the Circuit Court of Appeals simply upon this point was not final and only in effect remanded the case for a new trial. Your petitioner respectfully states and represents, however, that it not only appears in this case that your petitioner openly defended its agent Fry and paid all the costs and expenses of such defense and special counsel and experts in the making thereof, but that such defense was known to respondent Cramer's counsel at that time, your petitioner offering directly and positively to so prove under the sustained objection thereto of respondent Cramer's counsel.

Your petitioner further and finally respectfully submits that all of the grounds, reasons and matters asserted and appearing herein for the granting of this petition are duly authorized, raised and presented by the bill of exceptions, assignment of errors, etc., in due and proper order and place, as appears by a

certified copy of the record of the entire case and proceedings here present, and as your petitioner understands will be more carefully and succinctly pointed out in an accompanying brief by petitioner's counsel filed herein and herewith; that your petitioner has not understood that it would be expected in this petition for your petitioner to state all of the facts and propositions in detail that will be relied upon in support of this petition if granted, and that your petitioner has therefore only stated the salient points, positions, reasons and facts upon which this petition is based and founded.

Wherefore, your petitioner respectfully prays and petitions that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the 9th Circuit, commanding said court to certify and send to this court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals in the case therein entitled The Singer Manufacturing Company, plaintiff in error, *vs.* Herman Cramer, defendant in error, No. 638, as identified by the transcript of the record, and to cease and withhold any further action or order in said case until the further order of this court, to the end that the case may be reviewed and determined by this court as provided by (section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals "and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes.") (2) Approved March 3, 1891; and that your petitioner may have such other and further relief or remedy in the premise as to this court may seem appropriate and in conformity with said act, and that the judgment and finding of said Circuit Court of Appeals in this case and every part thereof may be reversed by this honorable court.

And your petitioner will ever pray, etc.

THE SINGER MANUFACTURING COMPANY,

By Frederick G. Bourne,

President.

Charles K. Offield,
Milton A. Wheaton,
Counsel for Petitioner.

United States of America,
Southern District of New York. } ss.

Frederick G. Bourne, being first duly sworn, states that he is president of the above named petitioner, The Singer Manufacturing Company, and as such president has full knowledge of its business affairs and particular knowledge of the matters and things set forth in the above petition and of the conduct and proceedings in the above-entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true, except as stated upon information and belief, and as to such statements he believes the same to be true.

Frederick G. Bourne.

Subscribed and sworn to before me this 23d day of December, A. D., 1901.

[Seal.]

Edward E. Black,
Notary Public.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petition should be granted by this honorable court.

Charles K. Offield.

(1) To-day "District" would be used instead of "Circuit."

(2) To-day the citation would read "Sec. 240 of the Judicial Code."

Much of the Act of March 3, 1891, was brought forward in the Judicial Code, Secs. 5 and 6 of the early act, being essentially incorporated in Secs. 128 and 238, respectively, and in Sec. 240. See this case at 184 U. S. 698.

No. 1959.

**Petition for Writ of Certiorari in Admiralty Case in the
Supreme Court of the United States.**

The petition of the Erie & Western Transportation Company,
The British & Foreign Marine Insurance Company, Limited,

The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, for writ of *certiorari*, directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of The Union Steamboat Company, Claimant and Appellant, against the propeller Conemaugh, The Erie & Western Transportation Company, *et al.*, Claimants and Intervenors.

To the Honorable Judges of the Supreme Court of the United States:

The said petitioners respectfully show to this court as follows:

First. Your petitioner, the Erie & Western Transportation Company, is a corporation of the Commonwealth of Pennsylvania, and the other petitioners are insurance companies and corporations duly created and existing under the laws of various states and countries, and that the said transportation company is the owner of the propeller Conemaugh and was at the time of the collision mentioned in this cause, and that the other petitioners were underwriters on her cargo and as such suffered a loss by reason of said collision, the aggregate of the loss, as fixed by the decree of the District Court herein, being \$69,978.91.

Second. The case grows out of a collision which occurred on a clear, pleasant, starlight evening, close to the Canadian bank of the Detroit river, a short distance below the city of Detroit, between the said propeller Conemaugh, bound down and laden with miscellaneous cargo, and the Union Steamboat Company's steamer, the New York, bound up the river, in which the Conemaugh was struck on her starboard side forward and almost immediately thereafter beached and filled on the Canadian channel bank.

Third. The Conemaugh, with all the signal lights required by law, properly placed and burning brightly, having a full complement of officers properly stationed and attentive to their

duties, with two men at the wheel, was proceeding down on a course somewhat to the American side of midchannel. Reaching a point about three-quarters of a mile above a dock on the American side, known as Smith's coal dock, her watch discovered the propeller Burlington, with a tow of four lumber barges, whose course down the river had been on the Canadian side of midchannel, but was now rounding to for the purpose of coming up to Smith's dock. The full length of the tow was about 2,826 feet; the channel at that point was about five-eighths of a mile in width. When the Burlington had come around so as to exhibit to the Conemaugh her green and white lights, and the first barge her green light, the Burlington blew a signal of two blasts, thereby indicating to the Conemaugh that she should pass down between the tow and the Canadian shore. The Conemaugh answered with two blasts, checked the speed of her engine from 70 to 40 revolutions, and hard starboarded in accordance with the signals exchanged. The master of the Conemaugh seeing, with the aid of his glass, that there was sufficient room for him to pass between the tow and the Canadian shore, assumed a course diagonally across the river, and while on that course the watch on the Conemaugh discovered the lights of what proved to be the propeller New York coming up the river a considerable distance below the tow, and sounded to her a signal of two blasts, indicating her purpose to continue her course and pass down on the Canadian side. The Conemaugh was then in Canadian waters, and the New York, apparently, about midchannel. Receiving no answer, the Conemaugh repeated her signal, but without receiving any reply. The vessels were then perhaps three-quarters of a mile apart. The clear space of navigable water between the tow and the Canadian channel bank, as found by the Circuit Court of Appeals, was not less than five hundred feet, according to the lowest estimates given by the witnesses, a space sufficient for the navigation of the steamers.

The Burlington was then well over to the dock on the Amer-

ican side, the tow forming nearly a semi-circle, the last barge heading some two points to starboard from directly down the river and working down at a speed of about four miles an hour, including the drift of about a two-mile current. The Conemaugh was going at checked speed over toward the Canadian shore, heading some 45° from directly across; the New York was on a course below the tow, which, as was later developed by testimony from the barges, would have brought her in collision with the third barge of the tow.

In this situation the Conemaugh again blew a signal of two blasts. Dispute exists as to her distance astern of the tow, the shortest distance suggested by the testimony being three hundred feet; clear evidence, in our opinion, fixing it at from seven hundred feet to a thousand feet.

As indicated by the lights of the New York, the Conemaugh was crossing the course of the New York at a safe distance ahead, both vessels navigating in Canadian water.

To this third signal of two blasts there was no answer. Shortly afterward the New York, doubtless for the purpose of avoiding the rear barges of the tow, but without signal of any character to the Conemaugh, altered her course by porting; thereupon the Conemaugh blew an alarm signal, put her wheel hard astarboard and gave a strong signal to the engine. The New York, then abreast of a point between the last two barges of the tow, and, in any view of the testimony, not over a quarter of a mile from the Conemaugh, stood on with undiminished speed and having started to swing back on starboard helm, struck the Conemaugh near the forward gangway and she sank within a length (250) feet of the Canadian bank. The evening being clear and starlight, there was nothing to prevent the New York from seeing the Conemaugh's lights or hearing her signals if a proper watch were kept.

The New York, although her officers and crew were in court, called no witnesses, but her answer admitted an entire failure to see the lights of the Conemaugh or to regard her signals,

the language of her answer being, "when the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessels, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel"; also that while passing under the stern of the last barge, having starboarded her helm, she heard several short blasts of the Conemaugh close at hand, not more than 100 feet away, but "collision was then inevitable, but there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm."

Before the Burlington had rounded to and sounded the signal of two blasts to the Conemaugh, she had exchanged a signal of one blast with the New York, then a mile and a half or more below the Burlington and coming up somewhat on the American side of midchannel. The New York and Conemaugh were more than three miles apart and these signals were not heard on the Conemaugh nor was the presence of the New York discovered by the Conemaugh, although a proper watch was kept, until after the Conemaugh had starboarded and was in the performance of her agreement with the Burlington, as before stated.

The Circuit Court of Appeals found: "The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one (colored) light."

Also, "It is not disputed that the courses of the two vessels were crossing, so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side."

And, "The Conemaugh, therefore, being where she was, was either in, or dangerously near, the course of the New York, and was not keeping out of her way."

Although the Conemaugh had indicated to the New York by her signal, repeated three times, her intention to cross the bows of the New York, and although, as admitted in the answer, the Conemaugh "continued on her course across the bows of the New York so that the latter struck her stem on," yet the New York did not at any time signal the Conemaugh, nor did she stop or check her speed before the collision occurred.

Fourth. On the 11th day of November, 1891, the Erie & Western Transportation Company filed its libel in the District Court for the eastern district of Michigan on behalf of itself as owner of the Conemaugh and as trustee for persons interested in her cargo, and subsequently the insurance companies joining herein intervened for their interest as underwriters on cargo. Answer was duly filed containing the admissions already stated. The case came on for hearing before the District Court. The witnesses for petitioners, including the officers and crew of the Conemaugh, were examined in open court, and it was held that the collision occurred 900 or 1,000 feet from and a little on the port quarter of the stern barge of the Burlington tow, which barge was held to have been 800 or 900 feet from the Canadian shore, headed somewhat toward the American side of the river. The court held that, assuming a temporary departure by the New York from her course to have been necessary and justified by the presence of the tow, still there was ample room for her to starboard and resume her course after passing the tow, which would have taken her astern of the Conemaugh; that this was a plain duty on her part which the master of the Conemaugh had a right to expect her to perform, as the Conemaugh had then "crossed the lawful path of the New York." Also, that the proofs established that the New York maintained double the speed of four miles, stated in her answer, until the vessels came together and was grossly in fault and negligent in failing to see the lights and hear the signals of the Conemaugh; or, seeing and hearing,

guilty of even worse fault in disregarding them. It held that the faults of the New York were so many and flagrant that "it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation." See copy of opinion "A." hereto attached (53 Fed. 553).

Having found that the Conemaugh had in fact crossed the lawful course of the New York and was free from fault until the danger signal was blown, the court condemned the Conemaugh for failure to reverse; but afterwards, on petition for rehearing, in view of the fact that collision was then inevitable and so expressly admitted in the answer, and in view of the then recent utterance of this court in the city of New York, 147 U. S. 85, the court modified its decree and exonerated the Conemaugh, as will appear from copy of the opinion of the court rendered May 16, 1895, a copy of which is hereto attached "B."

Fifth. The case was duly appealed by owner of the New York, to the Circuit Court of Appeals, and that court, modifying only slightly the facts as found by the District Court and addressing its consideration to the three faults against the New York:

1. In failing to keep a proper lookout and answer signals;
2. In failing to keep her course; and
3. In not stopping and reversing when there was danger of collision,

reversed the decree of the District Court, held the New York to be free from fault, dismissed the libel and ordered a personal decree against your petitioner, the Erie & Western Transportation Company, for the damages to the New York, as will appear from the opinion of that court filed October 5, 1897, hereto attached: "C"; (82 Fed. 819). Afterwards petition for rehearing was denied.

Sixth. Your petitioners respectfully represent to the court that the decree of the District Court in the case should have been affirmed, and that there are several questions involved in

this litigation of a general character upon which there have been conflicting decisions of the lower courts, the settlement of which by this court is highly desirable.

1. The Circuit Court of Appeals holds that the great lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the operation of the International Regulations for prevention of collision at sea, adopted by the United States in 1885 (23 St. 438,) and which had been adopted substantially in the same form by the leading nations, and which, as hereinafter shown, governed in Canadian waters.

2. The court also held that it could not regard the Canadian Regulations without technical proof of the law.

The Canadian regulations applicable are Articles 15, 16, 18, 19, 22 and 23 of "An Act respecting the Navigation of Canadian Waters, R. S. C. c. 79," founded on the Imperial Regulations, which came into force September 1, 1884 (Order in Council, 9 P. D. 248), which are identical with the corresponding articles of the International Rules as adopted by us in 1885 (23 St. 438) as follows:

Art. 15.—"If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other:

(a) This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other;

(b) The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other.

(c) It does not apply by day, to cases in which a ship sees

another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Art. 16.— "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

Art. 18.— "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary."

Art. 19.— "In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say: One short blast to mean 'I am directing my course to starboard'; two short blasts to mean, 'I am directing my course to port'; three short blasts to mean 'I am going full speed astern.' The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made."

Art. 22.— "When by the above rules one of two ships is to keep out of the way, the other shall keep her course."

Art. 23.— "In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Under such rules, making the use of signals optional with each steamer, the finding of the Circuit Court of Appeals that the silence of the New York in the face of our signals denoted dissent to our proposal, would have been clearly wrong.

3. Though these vessels were in Canadian waters, the court applied the rules found in section 4233 of the Revised Statutes, and Rule 2 of the Supervising Inspectors' rules which latter

require a steamer, having another on her starboard hand, to keep out of the way by porting.

Rules 1, 2 and 3 of pilot rules for lakes and seaboard, are as follows:

Rule 1. "When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right, or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right, or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left, or on the starboard side of each other."

Rule 2. "When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Rule 3. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

The supervisors' rules, extended to foreign waters, were applied to the *Conemaugh*, but notwithstanding the plain provisions of Rule 3, the absence of lookout and ignorance of the other steamer's presence in dangerous situation, giving signals of an intention to cross the New York's bow, were excused on the ground that seeing lights and hearing signals indicating such course, the New York would still have had the right to maintain her speed in silence.

As to these questions the contention was and is that the great lakes are not to be excluded as "lakes and inland waters" from the operation of the Navigation Act of 1885; that the supervisors' rules have no extra-territorial force, and if they had, that Rule 2, given a construction which when a steamer has another on her own starboard hand, requires the burdened steamer in any such situation, even when practically crossing the course of another at a safe distance ahead, in every case to port, is unreasonable, is in derogation of the statute which, fixing the starboard hand rule, makes no requirement as to how the burdened steamer shall keep out of the way, and so without force; and that a court of admiralty will take judicial notice of the navigation rules of another sovereignty for preventing collision at sea when they are of the character of the Canadian rules.

4. The Circuit Court of Appeals also held that although these steamers were on crossing courses so as to involve risk of collision, and although the *Conemaugh* had signaled her intention to continue on her course across the bows of the New York, and although under the rules applicable under the Revised Statutes, it was the duty of the New York to keep her course, still the New York was justified in changing her course to starboard, and in the direction of the course of the *Conemaugh*, because of the presence of the stern barges of the Burlington's tow, which, as petitioners show, were a temporary moving obstacle in the way of the New York, and which were then moving toward the American shore out of the way of the New York, and which the New York might have

avoided by checking or stopping and breasting the current until said barges had gotten out of her way. Upon this point the Court of Appeals in its opinion said:

"It is well settled . . . that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence, and must allow for the effect . . . The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken had the Conemaugh not been in sight."

5. The Circuit Court of Appeals also held that the New York having changed her course on account of said barges, was not obliged immediately to resume her course after passing the last barge. Upon this point the court, in its opinion, said,

"But it is said that after the New York passed the tow her proper course was to swing to port under the stern of the last vessel in the tow, and thence over towards midchannel, instead of which she continued on towards the Canadian shore, and ran into the Conemaugh. It is undoubtedly true that the New York's proper course, after passing the tow, was to resume her general course up stream near midchannel. All the witnesses who observed her course, admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port; and the only question is, did she begin to do this as soon as she ought to have done it? . . . She was not obliged to turn a sharp corner around the stern of the last barge in the tow. She certainly would not have done this had the Conemaugh not been there, and as we have seen, her proper course could not be affected by the fact of the Conemaugh's presence."

The contention of petitioners is that the New York having received signals of two blasts from the Conemaugh, which had her on the starboard hand, was under obligation *as to the Conemaugh* to hold her course, and had no right, especially

without giving notice by signaling, to make a change of course which must necessarily tend to hamper the maneuvers of the Conemaugh; that said moving barges did not constitute such an obstruction as justified the New York in changing her course, and if the New York did have the right to change her course in the manner and for the reasons indicated, *she was bound in duty to the Conemaugh to make the least change necessary and to come back to her original course as quickly as practicable after clearing the end of the tow.*

It is found by both courts that there was ample channel room (not less than 500 feet) and the conflict of opinion arises on the finding by the Court of Appeals that the New York did not owe this duty to the Conemaugh, but in making the departure in the direction which tended to interfere with the Conemaugh's announced maneuver for clearing, had the right to pursue such a course in the premises as she would had the Conemaugh not been present.

The Circuit Court of Appeals also held that the New York was entirely without fault, though she failed to maintain lookout or watch or to observe the signals and lights of the Conemaugh or to make any effort whatever to avoid or minimize the effect of collision, since she had the right to navigate as she did.

Contention on this point is that the New York was in fault in this respect in as much as the signals and lights of the Conemaugh, if observed, should have led the New York to check her speed and so obviate the necessity of turning out for the tow; or, if she chose to go on, to make that departure only so great as was necessary to clear the obstruction and then pass to starboard of the Conemaugh; or, in any case she would have had time to reverse; whereas, the plain admission of her answer is that continuing her speed she did not know and recognize the presence of the Conemaugh in her vicinity, or as affecting in any manner her navigation, until, in the language of the answer:

"A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York."

Indeed, a previous statement of the answer puts the Cone-maugh then "close at hand and not more than 100 feet away."

Seventh. Your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of *certiorari* for the following reasons:

1. (a) The questions involved arise under collision rules which relate to the navigation of the great lakes, and involve the question whether the American or Canadian law controls in the navigation of American ships in Canadian waters, into and through which nearly all of the immense commerce of the great lakes must pass in some portion of the voyage.

(b) Also the question of the extra-territorial force of the rules of the Supervising Inspectors, vessels being required to navigate, as stated, in foreign waters.

(c) The statute requiring a steamer having another on her own starboard hand to keep out of the way, whether it is competent for the Supervising Inspectors to pass a supplementary rule requiring this to be done in a particular manner.

(d) After the starboard hand rule has come into operation between two steamers, whether the intervention of another moving steamer is such a special circumstance as will permit the privileged steamer to alter her course, at night, without notice, in such manner as to conflict with the maneuver of the burdened steamer to clear, although it is clear that such privileged steamer may at the same time avoid the intervening vessel and hold her own course as to the burdened steamer by simply checking her speed?

(e) Granting such right, should she make the least deviation necessary and come back as quickly as practicable, or may she make such deviation as if the vessel bound to keep out of her way were not present?

(f) After the starboard hand rule has come into operation, with its burden and privilege respectively, is the privileged

steamer so far privileged as to her course and speed that it is unnecessary for her, at night, to regard the lights and signals of the approaching steamer; and is she so far privileged that upon the intervention of a temporary, floating obstacle, which she may avoid by checking and still hold her course as to the burdened vessel, that, though she chose to maintain her speed and alter her course in a manner and direction which must necessarily embarrass and may thwart the maneuver to the burdened steamer to clear, it is unnecessary for her to pay any heed to or give any notice to the burdened vessel of her intention?

(g) Is the privileged vessel so far privileged that when the burdened vessel is "either in, or dangerously near" the course of the privileged vessel, and is "not keeping out of her way," the privileged vessel need neither stop nor reverse, but having altered her course for a temporary obstacle, may turn back to midchannel on an "easy sweep" regardless of the presence of the burdened vessel?

2. The amount involved is large, being with the New York's damage about \$73,000.00.

3. The decision of the Circuit Court of Appeals as it stands is opposed to decisions of the admiralty courts of this country.

4. The decision of the Circuit Court of Appeals as it stands, exonerates the New York for making a departure from her course at night without notice, after being signaled by the *Conemaugh* and after the starboard hand rules had become operative, so long as that departure, being on account of a temporary floating obstacle, was not greater than she might have made *had the Conemaugh not been there signaling her and though she might in fact have made less departure and so avoided collision.*

5. The decision of the Circuit Court of Appeals exonerates the New York, although she had no lookout or any competent watch, and was ignorant of the presence of a large steamer which had been displaying proper lights and blowing repeat-

ed signals until that steamer, with which she collides, was within a hundred feet and collision was inevitable, though the collision occurs while she is engaged in a conflicting change of course made without notice to avoid another moving vessel, after coming under the operation of a rule requiring her to hold her course, and without which change or with a smaller departure, which was possible, the collision would not have occurred.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Sixth Circuit to bring up this case to this honorable court for such proceedings as shall seem just.

The Erie & Western Transportation Co.

By Harvey D. Goulder, Proctor.

The British & Foreign Marine Insurance Co., Limited.

The Insurance Company of North America.

The Union Marine Insurance Company, Limited, and

The Marine Insurance Company.

By F. H. & G. L. Canfield,

Proctors for

The British & Foreign Marine Ins. Co., *et al.*

Petitioners.

United States of America,
Northern District of New York,
County of Erie, ss.

E. T. Evans, being duly sworn on his oath says that he is the agent of the petitioner herein the Erie & Western Transportation Co.; that said petitioner is a corporation, that deponent has read the foregoing petition and that the same is true to the deponent's knowledge, information and belief, and deponent's knowledge is derived from the fact that he has acted for said petitioner in all matters connected with this litigation.

E. T. Evans.

Subscribed in my presence and sworn to before me this 29th day of March, A. D., 1898.

Harvey L. Brown,
Notary Public,
Erie County, N. Y.

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

Harvey D. Goulder,
Proctor for E. & W. T. Co.,
F. H. Canfield, Counsel.

(1) Writ of certiorari granted. Union Steamboat Co. v. Cone-
maugh, 189 U. S. 363, 47 L. Ed. 854.

No. 1960.

Petition for Writ of Certiorari in Bankruptcy.

In the Supreme Court of the United States.

October Term, A. D. 1900.

Arthur E. Mueller, Trustee in Bankruptcy
of Edward B. Nugent, Bankrupt, Petitioner,

vs.

William T. Nugent, Respondent.

Petition for Writ of *Certiorari*, to the United States Circuit Court of Appeals for the Sixth Circuit, Requiring it to Certify to the Supreme Court of the United States, for its Revision and Determination, the Petition for Review in Bankruptcy taken by said W. T. Nugent against Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, in the Matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank vs. Edward B. Nugent, Bankrupt, in Bankruptcy, Lately Depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of section 25*d* of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one decided by this court in *Bardes vs. Bank*, 178 U. S., page 524. Upon its determination by this court depends to a large extent the usefulness of said act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to \$14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of *Bardes vs. Bank*, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the court

to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the judge showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the judge the depositions read on the hearing of the case, and same were before the judge.

The judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in court, he was called to the bar to receive sentence; whereupon, at the request of said W. T. Nugent by his counsel, the judge deferred passing sentence for two days. At the expiration of said two days said respondent by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such responses should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. In his opinion filed, the judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

“The court finds the facts of the case to be as above stated, with the addition that the entire amount, \$14,233.95, is the property of the bankrupt’s estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt’s creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee.” (R., pp. 30-31.)

In refusing to permit said amended response to be filed, the court entered the following order:

“Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court

not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of \$14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under section 24*b* of the act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the moneys alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the printed

opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determine."

32. "In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the case. (R., p. 56.)

Second. With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or before the referee or judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to-wit:

"He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

Third. The Supreme Court, in *Bardes vs. Bank*, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and *claiming the property "as his own,"* and which transfer is *alleged to have been fraudulent as against creditors*. Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting

no adverse title to the property, and further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by *Bardes vs. Bank, supra*.

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of *certiorari* is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is reversed or materially modified, the power of the Bankruptcy Court under section 2 (6), (7) and (13) of the act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in *Bardes' case*, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same state to recover assets, the title of which is in dispute; but the question involved is

this. Can the District Court by rule compel an agent or custodian for the bankrupt or for the court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not section 2 within its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of *Bardes vs. Bank*, *supra*, is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the *Bardes* case. In fact, this court, in stating the question decided in the *Bardes* case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adverse holding was the foundation upon which this court based that opinion.

After diligent search petitioner has been unable to find any

definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that court only the power to review matters of law. (*In re Purvine*, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in *Cunningham vs. German Insurance Bank*, 103 Fed., 932, and has further decided that only such matters as were acted upon by that court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

Fourth. This court, in the case of *White vs. Schloerb*, 178 U. S., 542, decided that a judge of the Bankruptcy Court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the *White vs. Schloerb* case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for

the benefit of the bankrupt, and hence for the court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re Rosser*, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis*, and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, *in re Francis-Valentine Co.*, 94 Fed., 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on *Marshall vs. Knox*, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no

adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (*In re Brooks*, 91 Fed., 518; *in re Raymond W. Kenney*, 95 Fed., 427; *in re Moore*, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with *White vs. Schloerb*, 178 U. S., 542.

In re Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain "funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts district, basing his opinion upon the case of *Bardes vs. Bank*, refused to grant the injunction, and commenting on the cases of *Bardes vs. Bank* and *White vs. Schloerb*, closes his opinion with the following language:

"It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by section 5 of the Judiciary Act of 1891, 26 Stat. 827,(1) I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the act itself, required by section 8, sub-section 4, Article I, of the Constitution of the United States) as to the grave and important question, to wit: The right of the court of Bankruptcy to summarily order in property which is admittedly assets of a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company, and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent for review, No. 920," to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that court in bankruptcy.

And your petitioner will ever pray.

| | | |
|--------------------|---------|-------------------------|
| | | WILLIAM W. WATTS, |
| Jefferson County, | } Sect. | JOHN RICHARD WATTS, |
| State of Kentucky, | | Counsel for Petitioner. |

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes. WILLIAM W. WATTS.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

| | |
|---------|--|
| | E. B. KERR, |
| [Seal.] | Notary Public within and for County of |
| | Jefferson, State of Kentucky. |

(1) Now Judicial Code, Sec. 128.

Certiorari is now the only manner of reaching the Supreme Court in a bankruptcy case, and that proceeding is now provided for by Act of January 28, 1915, 38 Stat. L. 803, Ch. 22, Sec. 4, which repeals Bankruptcy Act, Sec. 25b, and the Act of January 28, 1916, 39 Stat. L. 727, is a practical re-enactment of 38 Stat. L. 803, Sec. 4.

See for record *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405.

No. 1961.**Petition for Writ of Certiorari to a Circuit Court of Appeals.
Chinese Exclusion Case (1).**

In the Supreme Court of the United States,
— Term, 18—.

Ex parte Lau Ow Bew, Petitioner.

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of Lau Ow Bew, Appellant, *vs.* The United States, Respondents.

To the Honorable the Supreme Court of the United States:

The petition of Lau Ow Bew respectfully shows to this honorable court as follows:

First. Your petitioner is a person of the Chinese race, and a natural-born subject of the Emperor of China; but he is now, and for the past seventeen years has been, a resident of the United States of America, and of no other country, having his domicile in the city of Portland, in the state of Oregon; and during all that time he has been a merchant engaged in the wholesale and importing business, as a member of the well-known commercial firm of Hop Chong & Co., in the said city of Portland.

Second. Your petitioner, on the 30th day of September, 1890, departed from the United States on a temporary visit to his relatives in China, with the intention of returning as soon as possible, and he did return to the United States on board of the steamship Oceanic, which arrived at the port of San Francisco, in the state of California, on the 11th day of August, 1891. At the time of his departure he procured satisfactory evidence of his status in this country as a merchant, under the regulations of the treasury department of the United States, adopted July 3, 1890, one of which is as follows:

“Chinamen who are not laborers, and who may have here-

tofore resided in the United States, are not prevented by the existing laws or treaty from returning to the United States after visiting China or elsewhere. No certification, or other papers, however, are issued by the department, or by any of its subordinate officers, to show that they are entitled to land in the United States, but it is suggested that such parties should, before leaving the United States, provide themselves with such proofs of identity as may be deemed proper, showing they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

Third. Your petitioner, on his return to the United States, presented said proofs to the collector of the port of San Francisco; but the collector, while acknowledging the sufficiency of the same, and admitting that your petitioner was a merchant domiciled herein, and, therefore, entitled to the protection of the treaty between the United States and China, concluded July 28, 1868, popularly known as the Burlingame Treaty, and the supplemental treaty between the said governments, concluded November 17, 1880, and the act of congress entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, as amended July 5, 1884, refused to permit your petitioner to land, on the sole ground that he failed and neglected to produce the certificate of the Chinese Government, mentioned in Section 6 of the said act of May 6, 1882, as amended by the said act of July 5, 1884; and the collector based this refusal upon the opinion of this honorable court in the case of *Wan Shing vs. United States*, No. 1414, October term, 1890, decided May 11, 1891.

Fourth. Your petitioner thereupon, to wit, on August 14, 1891, filed a petition in the circuit court of the United States for the northern district of California for a writ of *habeas corpus*, to obtain his discharge from detention, alleging, *inter alia*, that he was a merchant domiciled in the United States

for seventeen years last past, and that it was claimed by the master of the said steamship that he could not be allowed to land under the provisions of the sixth section of the said act of May 6, 1882, as amended by the said act of July 5, 1884.

The writ was issued directed to the master of the said steamship, who produced the body of your petitioner before the said court on the 15th day of August, 1891, and made return to the writ that he held the petitioner in his custody "by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act."

The United States district attorney filed an intervention for and on behalf of the United States, and made opposition to the said writ. It was not alleged or pretended, in such intervention on behalf of the United States, that your petitioner was a laborer, or that the refusal of the customs officers at San Francisco to allow him to land, and his consequent detention by the master of the said steamship, were based upon the provisions of the Chinese Exclusion Act of October 1, 1888; but on the contrary it was averred, in said intervention, that your petitioner was lawfully detained by the said master because he was a Chinese person, and failed to produce to the collector of customs, or to any other authorized officer the certificate of identification required by the said act of 1882 as amended by the said act of 1884.

An answer or traverse to the said return to the said writ, and the said intervention on behalf of the United States, was filed by the petitioner.

The said case was and is entitled and numbered in the circuit court of the United States for the northern district of California "In the Matter of Lau Ow Bew on *Habeas Corpus*, No. 11415."

Fifth. The said case was heard and determined by the said circuit court upon an agreed statement of facts, signed by the United States district attorney and the attorneys for

the petitioner, and filed therein, which statement of facts is as follows:

It is hereby stipulated and agreed that the following are the facts herein:

"First. That the said Lau Ow Bew is now on board the steamship Oceanic, which arrived in the port of San Francisco, state of California, on the 11th day of August, A. D., 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

"Second. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"Third. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, state of Oregon, under the firm name and style of Hop Chong & Co.

"Fourth. That the said firm is worth \$40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"Fifth. That the said firm does a business annually of \$100,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars, as duties upon imports.

"Sixth. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanic on the 11th day of August, A. D. 1891.

"Seventh. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the

sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in Section 6, of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884.

"Charles A. Carter,

" U. S. District Attorney.

" Harvey S. Brown and

" Thomas D. Riordan,

"Attorneys for Petitioner."

Sixth. Such proceedings were had in the said case in the said circuit court of the United States, that on the 11th day of September, 1891, the said court rendered a judgment therein as follows:

"This matter having been regularly brought on for hearing before the court and the judge thereof, the United States attorney having appeared and intervened on behalf of the United States, and the same having been duly heard and submitted, and due consideration thereon had, it is by the court now here considered—

"That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty as therein alleged.

"It is further adjudged and found that he came from China by the steamship Oceanic, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

"It is therefore ordered that the said Lau Ow Bew be remanded by the United States Marshal for the Northern District of California to the custody whence he was taken, to wit; on board the said steamship to the custody of the master of said steamship, or, in case of a change of master, to the custody of the master thereof, whoever he may be, at the time of this order of remand; or to place him in the hands and charge of any party on board of said steamship for the time being representing the master, or then in charge of said

steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship whether still in port, not having departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason, the said Lau Ow Bew can not be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came. And for the purpose of carrying this order into effect it is further ordered that the said marshal shall take the said Lau Ow Bew into their custody, and him safely keep till said order shall be fully executed."

Seventh. The said case of your petitioner, in the said circuit court of the United States, was heard before and decided by the Hon. W. H. Beatty, district judge of the United States for the district of Idaho, sitting in the said court, and the opinion of the court was delivered by him.

Eighth. Your petitioner, on the same day, was duly allowed by the said circuit court an appeal from its said judgment to the United States circuit court of appeals for the ninth circuit, and it was ordered by the court that a certified transcript of the record and of all proceedings in the said case be forthwith transmitted to the said United States circuit court of appeals.

Ninth. On the 3d day of October, 1891, a certified transcript of the record and of all proceedings of the said circuit court, in the said case, was filed in the United States circuit court of appeals for the ninth circuit, and the said case was entered and docketed in the said court of appeals, and entitled "Lau Ow Bew, appellant, vs. The United States, respondent, No. 12."

The assignment of errors filed on behalf of your petitioner was as follows:

"Afterwards, to wit, on the first Monday in October, in the same term, before the judges of the circuit court of appeals for the ninth circuit, at the city of San Francisco, in the district of California, comes the said Lau Ow Bew, appellant, by Harvey S. Brown, and Thomas D. Riordan, his attorneys, and says that in this record aforesaid there is manifest error in this, to wit:

"That the circuit court of the ninth judicial circuit, in and for the district of California, erred in deciding—

"1. That the appellant is not entitled to enter the United States.

"2. That he is not unlawfully restrained of his liberty.

"3 That the said appellant was required to produce the certificate required by Section 6 of the act known as the Chinese Restriction Act, passed May 6, 1882, as amended July 5, 1884.

"4. That a Chinese merchant domiciled in the United States and departing therefrom temporarily with the intention of returning should, before being permitted to reenter the United States, produce the certificate required by Section 6 of the act above referred to.

"5. That he be remanded to the custody of the master of the steamship whence he was taken.

"And the said Lau Ow Bew prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

"Harvey S. Brown and

"Thomas D. Riordan,

"Attorneys for Appellant."

Tenth. The case came on to be heard in the said circuit court of appeals on the 5th day of October, 1891, before the Hon. E. M. Ross, United States district judge for the southern district of California, and the Hon. Thomas P. Hawley, United States district judge for the district of Nevada; and on the 7th day of October, 1891, the said court rendered a

judgment affirming the said judgment of the said circuit court therein, as follows :

“Appeal from the circuit court of the United States for the northern district of California.

“This cause came on to be heard on the transcript of the record from the said circuit court of the United States for the northern district of California, and was argued by counsel, and the same having been duly considered, and the opinion of the court having been read in open court and filed with the clerk, it is ordered that the judgment of the said circuit court be and the same hereby is affirmed, and the cause remanded to said circuit court at the cost of the appellant.

“On motion of Thomas D. Riordan, Esq., counsel for appellant, it is ordered that a stay of proceedings herein be and the same hereby is granted for and during the space of thirty days.”

A certified copy of the entire record of the said case in the said circuit court of appeals is herewith furnished, and hereto annexed, as part of this application, in conformity with rule 37 of this honorable court relative to cases from circuit court of appeals, and the same is marked exhibit “A.”

Eleventh. Your petitioner is advised and believes that the said judgment of the United States circuit court of appeals in the said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of congress entitled “An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,” approved March 3, 1891, the said case being made final in the said circuit court of appeals by the said act.

Twelfth. The said case was decided in the said circuit court of appeals, as well as in the said circuit court, upon the supposed authority of the decision of this honorable court in the said case of *Wan Shing vs. United States*, but the question

presented by and involved in the said case of the petitioner was not presented by or involved in the said case of *Wan Shing vs. United States*, and the said question was not decided in that case, nor was the decision of the same necessary for the determination of that case by this honorable court.

Your petitioner is informed and believes that the question presented by and involved in his said case was not discussed in any wise by counsel before this honorable court in the said case of *Wan Shing vs. United States*.

Thirteenth. It appears in the said agreed statement of facts, and it is thus admitted in this case by the government of the United States, that the petitioner is, and has been for seventeen years last past, a Chinese merchant domiciled and doing business in the United States; that he departed therefrom September 30, 1890, on a temporary visit to his relatives in China, with the intention of returning as soon as possible, and did return on August 11, 1891; that he was not prevented from landing by the authorities of the government of the United States upon any claim or pretense that he was a laborer, excluded by the provisions of the act of October 1, 1888; and that he was refused permission to land on the sole ground that he failed "to produce the certificate of the Chinese government, mentioned in section six of the Chinese Retriction Act of May 6, 1882, as amended by the act of July 5, 1884."

The question thus presented by the record in the case of your petitioner was, and is, whether he is entitled, as a Chinese merchant, long domiciled in the United States, who had departed therefrom in September, 1890, for a temporary purpose, to re-enter the country without producing the certificate in section six of the Chinese Restriction Acts.

Fourteenth. This honorable court declared in the said case of *Wan Shing vs. United States*, that the refusal to allow the petitioner therein to land was not grounded at all upon the said act of May 6, 1882, but was based wholly upon the provisions of the Chinese Exclusion Act of October 1, 1888,

which declared that it should be unlawful for any Chinese laborer, who, at any time before had been, or was then, or might thereafter be, a resident within the United States, or who had departed or might depart therefrom, and should not have returned before its passage, to return or remain in the United States.

It was thus claimed and maintained by the authorities of the United States, in the said case, that the said Wan Shing was a laborer, and lawfully detained as such, and that he was not a Chinese merchant, or within the exempt class when he sought to enter the United States.

It appeared affirmatively, by the testimony of Wan Shing, as your petitioner is advised, that he was a youth only seventeen years of age when he claimed to have been in the United States, and that he was, in fact, a laborer, and not a merchant, within the meaning of the treaties between the United States and China, and the Chinese Restriction Acts; that he first came to the United States in 1879, and departed therefrom in 1882; and that he did not return to, and seek to enter the United States until 1889. And there was no evidence in the said case, as your petitioner is advised, that Wan Shing, at the time of his departure from the United States, intended ever to return to the country, or to retain his domicile therein, if he ever had one.

Fifteenth. The petitioner is advised that the right of a Chinese merchant, admitted to be domiciled in the United States, and to have been domiciled therein for many years, who temporarily departed therefrom in the year 1890, *animo revertendi*, to re-enter the country without producing a certificate of identity, under the sixth section of the said act of 1882, as amended in 1884, was not drawn in question in the said Wan Shing case.

Sixteenth. Your petitioner is informed and believes that the case of Wan Shing *vs.* United States, being No. 1414 on the docket of this court for the October term, 1890, and advanced on the motion of the attorney general, was submitted without argument of any kind on behalf of the ap-

pellant, and upon a printed brief of Mr. Assistant-General Parker in the part of the United States; and that no assignment of errors was filed in the case by the counsel for the appellant, who did not appear in court when the case was called for trial, and who telegraphed from San Francisco to the clerk of this court that the case might be submitted upon the record. The appeal, in that case, was thus, as the petitioner is advised, virtually abandoned by the counsel for the appellant; and the petitioner is also informed and believes that substantially the only proposition in the brief for the United States, in the said case, was that the testimony in the record showed that Wan Shing was a laborer, and as such was not entitled to land under the provisions of the Exclusion Act of October 1, 1888.

Seventeenth. The importance and gravity of the question as to the rights of Chinese merchants domiciled in the United States, under the treaties between the United States and China, and the legislation of the United States to execute those treaties, will be recognized when it is stated, according to authentic statistics, that the Chinese merchants who are now domiciled in the United States are the owners and in possession of real and personal property valued at over \$20,000,000; that they pay annually to the United States government large sums of moneys as duties upon imports aggregating more than two millions of dollars; that nearly all of said merchants have branch houses in British Columbia, Cuba, Mexico, Peru, and the Hawaiian Islands; and that they are constantly and necessarily traveling between the United States and those countries for the purpose of collecting moneys due to them, and attending to their various interests in their branch houses therein. If such Chinese merchants, when visiting those countries, are obliged to produce certificates of identity under the restriction acts, in order, after such temporary absences, to re-enter the United States, they would be required, before returning thereto, to proceed to China, and there attempt to procure such certifi-

cates. It is manifest, however, that it would be impossible for those Chinese merchants who have been long domiciled in the United States to obtain the required certificate, because the Chinese government could not certify to the facts necessary to be set forth in them, nor could the proper diplomatic or consular representatives of the United States ascertain the truth in regard to such facts for the purpose of viseing and indorsing such certificates as provided by law.

Eighteenth. Before the promulgation of the opinion of this honorable court in the said case of Wan Shing *vs.* United States, by the treasury department of the government of the United States, in August, 1891, and thus before the petitioner went to China, in September, 1890, it had been uniformly held by that department that Section 6 of the Chinese restriction act of May 6, 1882, as amended by act of July 5, 1884, was not applicable to Chinese merchants domiciled in the United States, and who had departed therefrom temporarily, and that they might lawfully return upon the production of such evidence as should be satisfactory to the various collectors, of their status as resident merchants in the United States.

The first decision was rendered by the Hon. Charles J. Folger, on March 14, 1884; the second by the Hon. W. Q. Gresham, on September 25, 1884; the third by the Hon. H. F. French, on December 2, 1884; the fourth, fifth, and sixth by the Hon. Hugh McCulloch, respectively, on December 6, 1884, December 27, 1884, and January 14, 1885.

The question, also, came before the United States circuit court for the northern district of California on April 9, 1885, in the case of Ah Ping (reported in 11 Sawyer, 17), and it was there decided the same way; and thereafter the said treasury department, on November 8, 1888, and July 3, 1890, reaffirmed its previous rulings upon the subject.

The said decisions were thus all made before the petitioner left the United States to visit his relatives in China.

Nineteenth. Under the said decisions Chinese merchants

domiciled in the United States were accustomed to go and come under the treaties between the United States and China upon the production, on their return to this country, of such evidence of their status as was deemed satisfactory by the several collectors of the ports; and the records of custom-houses will show, as the petitioner is informed and believes, that such practice was not attended by fraud.

Twentieth. To require Chinese merchants domiciled in the United States, whenever they may depart therefrom temporarily with the intention of returning thereto, to produce certificates from the Chinese government in order to enable them to re-enter the United States, would seem to be equivalent, as has been observed, to an absolute refusal to permit their return, whereas the treaty between the United States and China of November 17, 1880, guarantees to such merchants the right "to go and come of their own free will and accord."

Twenty-first. Your petitioner thus respectfully submits that the question upon the legal and just construction and effect of the said Chinese Restriction Acts, involved in and presented by the said case of your petitioner, should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said question on the part of the petitioner and the United States.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the ninth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein entitled Lau Ow Bew, appellant, *versus* The United States, respondents, No. 12, to the end that the said case may be reviewed and determined by this court, as provided in Section 6, of the act of congress entitled "An act

to establish Circuit Courts of Appeals, and to define and to regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891,(2) or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

LAU OW BEW,

By THOMAS D. RIORDAN,

Attorney and Counsel for Petitioner.

J. HUBLEY ASHTON,

THOMAS D. RIORDAN,

Of Counsel for Petitioner.

(1) From the record In re Law Ow Bew, 141 U. S. 583; writ allowed to issue.

See Act of May 6, 1882, 22 Stat. L., chap. 126; Act of July 5, 1884, 23 Stat. L., chap. 220, and Act of October 1, 1888, 25 Stat. L. 584. for a review of the laws relating to Chinese immigration. See note to Act of October 1, 1888, in Sup. R. S., Vol. 1, p. 625. See also, Chae Chan Ping v. U. S., 130 U. S. 581; Wan Shing v. U. S., 140 U. S. 424. See Fed. Stat. Anno., 2nd ed., Vol. 2, pp. 66 to 114.

(2) Now the citation would be Judicial Code, Sec. 240.

No. 1962.

Verification of the Above Petition.(1)

District of Columbia,

City of Washington, ss.

Thomas D. Riordan, being duly sworn, says that he is one of the attorneys and of counsel for Lau Ow Bew, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of California, and in the United States Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition by him

subscribed, and that the facts therein stated are true to the best of his information and belief.

Thomas D. Riordan.

Sworn to and subscribed before me, this 29th day of October, 1891.

E. L. White, Notary Public,

[Seal.]

District of Columbia.

(1) From record *in re* Lau Ow Bew, 141 U. S., 583.

No. 1963.

Order Granting Petition for Writ of Certiorari.

[Caption.]

On a Petition for a Writ of *Certiorari* to the United States Circuit Court of Appeals for the ——— Circuit.

On consideration of the petition for a writ of *certiorari* herein to the United States circuit court of appeals for the ——— circuit, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said petition be and the same is hereby granted [*or as may be*].

No. 1964.

Writ of Certiorari from the Supreme Court to a Circuit Court of Appeals (1).

The United States of America, ss.

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the ——— Circuit, Greeting:

Being informed that there is now pending before you a suit in which A. B. is plaintiff in error [*or*, appellant] and C. D. is defendant in error [*or*, appellee], which suit was removed into the said circuit court of appeals by virtue of writ of error to [*or*, appeal from] the District Court of the United States for the ——— district of ———, and we, being willing, for certain reasons, that the said cause and the record and proceedings therein should be certified by the said

circuit court of appeals and removed into the supreme court of the United States, do hereby command you that you send without delay to the said supreme court, as aforesaid, the record and proceedings in said cause, so that the said supreme court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief
[Seal.] Justice of the United States, the — day of
—, in the year of our Lord one thousand
eight hundred and ninety —.

J. McK.,

Clerk of the Supreme Court of the United States.

(1) See Judicial Code, Sec. 240. See also note to Form No. 1954.

No. 1965.

Return to Writ of Certiorari to a Circuit Court of Appeals.

United States Circuit Court of Appeals

For the — Circuit, ss.

I, F. H., clerk of the United States Circuit Court of Appeals for the — Circuit do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of *certiorari* I now hereby certify that on the — day of — A. D., there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals

For the — Circuit.

The A. B. Railway, Plaintiff in Error,

vs.

C. D., Defendant in Error.

It is hereby stipulated that the transcript already filed, in

the clerk's office of the Supreme Court of the United States, with the petition for the writ of *certiorari*, be taken as a return to said writ, dated the——day of——.

R. X.

Counsel for A. B. Railway.

R. Y.

Counsel for C. D

Dated the——day of——.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of——in said circuit this——day of——, A. D.,——.

F. H.,

[Seal.] Clerk United States Circuit Court of Appeals
For the——Circuit.

(1) The return to a writ of *certiorari* is a regularly certified copy of the record in the Circuit Court of Appeals. In practice, however, the return is usually made pursuant to a stipulation of counsel filed in the office of the clerk of the Circuit Court of Appeals. The stipulation is in effect an agreement that the transcript of record filed with the application for the writ may be taken as a return to the writ and no new transcript made. The foregoing return is endorsed on the writ of *certiorari* and returned with it to the office of the clerk of the Supreme Court.

No. 1966.**Stipulation of Counsel Relative to Return to Writ of Certiorari.**

[*Caption.*]

Whereas, the Supreme Court of the United States has heretofore granted the petition of the plaintiff in error for a writ of certiorari to review the record in the above cause, and under date of December 8, 1915, issues its writ of certiorari directing the above court to send to it the record and proceedings in the above cause, a certified copy of which said record and proceedings have heretofore been lodged in said court by the plaintiff in error. Now, therefore,

It is hereby stipulated by and between the parties to the above entitled action that the certified copy of the record in the above entitled cause heretofore filed in the Supreme Court of the United States by the plaintiff in error as a part of its petition for a writ of certiorari may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit a certified copy thereof may be forwarded by him to the clerk of the Supreme Court of the United States as his return to the writ of certiorari issued out of the Supreme Court of the United States on the 8th day of December, 1915.

Dated December 15, 1915.

A. B.,

Attorney for Plaintiff in Error.

C. D.,

Attorney for Defendant in Error.

No. 1967.**Return to Writ of Certiorari.****[Caption.]**

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as clerk of said court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above entitled cause do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," in which said stipulation it is provided that the certified transcript of the record heretofore filed by the plaintiff in error in said cause in the said Supreme Court is a part of its petition for a writ of certiorari may be taken as the return to the said writ of certiorari, the original of which stipulation was filed in my office on this 23rd day of December, A. D. 1915.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the state of California, this 23rd day of December, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

By MEREDITH SAWYER,
Deputy Clerk.

No. 1968.**Stay of Mandate of United States Circuit Court of Appeals
Until Supreme Court Can Pass on Petition for Writ
of Certiorari.**

[*Caption.*]

On consideration of the application of Messrs. Mannix & Sullivan, counsel for the plaintiff in error, this day filed, for a stay of the mandate under rule 32 of this court in the above entitled cause, etc., and good cause therefor appearing, it is ordered that the mandate under rule 32 of this court in the above entitled cause be, and hereby is stayed until the Supreme Court of the United States passes upon the petition to be made thereto on behalf of the plaintiff in error for a writ of certiorari, provided the said petition be docketed in the said Supreme Court before the adjournment of the present session thereof. X. R.,

Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.

No. 1969.**Petition for Writs of Certiorari to the Court of Customs
Appeals, Upon Certificate by the Attorney-General
of the United States.**

[*Caption.*]

The petitioners pray for writs of certiorari to the Court of Customs Appeals to review the decision and judgment of that court rendered on the 12th day of May, 1916, in the above entitled cases, affirming the decision of the Board of United States General Appraisers (Rec. 20). The mandate upon decision was issued September 18, 1916, by the Court of Customs Appeals.

This petition is filed pursuant to the Act of August 22, 1914, amending Sec. 195, Act of March 3, 1911 (63d Cong., 2d Sess., Ch. 267), which provides:

[Here follows act.]

The Attorney General on January 26, 1916, in accordance with the foregoing statute, filed this certificate with the Court of Customs Appeals, to-wit:

"IN THE UNITED STATES COURT OF CUSTOMS APPEALS.

| | | |
|----------------------------------|---|-----------|
| G. S. Nicholas & Company et al., | } | No. 1594. |
| vs. | | |
| The United States. | | |

CERTIFICATE OF ATTORNEY GENERAL.

In pursuance of the act entitled 'An Act to amend section 195 of the Act entitled "An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,"' approved August 22, 1914, I, T. W. Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled 'No. 1594, G. S. Nicholas & Company et al v. The United States,' is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 22nd day of January, 1916.

Filed January 26, 1916.

United States Court Customs Appeals.

T. W. GREGORY,
Attorney General."

A similar certificate was filed in the Shaw case, suit number 1602.

We ask for a writ of certiorari because the decree of the Court of Customs Appeals is made final by statute; this petition is filed within the prescribed sixty days; the case involves international commercial relations between the United States and Great Britain and the practice of the Treasury Department relating thereto under statutes which may involve treaty rights; and because the case is of such importance as

to render expedient its review by this court as certified by the Attorney General of the United States.

[Here follows statement concerning British excise system.]

It is manifest—as a glance through the record will make fully apparent—that questions here in issue involve the international relations of the United States. The importance of the issue and the expediency of its review by this court is attested by the certificate of the Attorney General hereinbefore mentioned.

It is respectfully submitted that writs of certiorari should issue as prayed.

A. H. W.,

Attorney for G. S. Nicholas & Co. et al.

W. P. P.,

Attorney for Alex. D. Shaw & Co. et al.

No. 1969a.

**Petition for Writ of Certiorari in a Case Involving Cummins
Amendment to Act to Regulate Commerce.(1)**

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

| | |
|---|---|
| Chicago, Milwaukee & St. Paul Railway Company, Petitioner, | } |
| vs. | |
| McCaull-Dinsmore Company, Respondent. | |

Now comes the Chicago, Milwaukee & St. Paul Railway Company and respectfully petitions this court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the cause therein pending, numbered 5314, wherein petitioner is plaintiff in error and McCaull-Dinsmore Company is defendant in error, and states:

This action was brought in the District Court of the United States for the District of Minnesota, by respondent to recover of petitioner \$221.63, with interest, as a part of the damages for the loss of a car of wheat shipped from

Three Forks, Montana, on November 17, 1915, to Omaha, Nebraska, consigned to respondent. The shipment was made under a bill of lading, issued by petitioner, containing the following clause:

"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid." (Trans., 6.)

Petitioner admitted the loss, and its liability therefor, upon the basis of said clause, to-wit: "The value of the property at the place and time of shipment." It had paid respondent an amount representing such value. (p. 6.) Respondent claimed the value of the wheat "at the time and place of destination when it should have been delivered there" with interest, less freight charges. (p. 2.) The amount sued for represents the difference between the amount claimed by respondent and the amount paid by petitioner.

The jurisdiction of the District Court was invoked upon the ground that the suit arose under the Act to Regulate Commerce, approved February 4, 1887, and the several acts amendatory thereof, particularly the Act of March 4, 1915 (38 Stat. 1196), known as the First Cummins Amendment, respondent claiming that said provision in the bill of lading was expressly prohibited by that amendment, and petitioner contending to the contrary. (p. 309.)

The cause was tried in the District Court upon the pleadings and a stipulation of facts and that court found in favor of respondent. (252 Fed. 664.) Judgment was entered for the amount claimed, with interest, on August 23, 1918. (pp. 7-9.) Petitioner sued out a writ of error from the Circuit Court of Appeals to review such judgment, and after a hearing in that court, the judgment was affirmed on September 22, 1919. (pp. 19-21.)

The reasons relied on for the allowance of the writ are as follows:

I. The decision of the Circuit Court of Appeals holding that the clause in question was void under the First Cum-

mins Amendment of March 4, 1915, was based upon an erroneous interpretation of the language of that amendment.

II. The Circuit Court of Appeals, through an erroneous construction, has given to that amendment the effect of abrogating the rule of law established by the decisions of this court, sustaining the principle of the clause in question, and has reached the conclusion that because of said amendment carriers may no longer, by agreement with shippers in a bill of lading, provide that the amount of loss and damage shall be ascertained on the basis of value at time and place of shipment.

III. The decision of the Circuit Court of Appeals creates a conflict of decision in the Federal courts, in that it is opposed to the decision of the District Court of the Southern District of Ohio, Western Division, Sixth Circuit, rendered June 11, 1919, in *Springfield Light, Heat & Power Company v. Norfolk & Western Railway Co.*, reported in 260 Fed. 254, 261, wherein the clause in question was held to be valid. While the opinion in that case does not refer, in terms, to the First Cummins Amendment, it is a fact that the cause of action therein arose subsequent to that act; that, pending the determination of that suit, the attention of the court was called to the opinion of Judge Morris in the District Court, in the case at bar (252 Fed. 664) rendered August 23, 1918, and counsel for defendant in the Ohio case, filed a brief contending that the opinion proceeded upon an erroneous interpretation of the amendment. There was no review of the Ohio case by appeal or writ of error.

IV. These conflicting decisions, establishing different rules of law in the two circuits, place carriers operating in or through both circuits, either individually or under joint through rates, in the position of making unlawful discriminations if claims originating in the Eighth Circuit are settled on the basis of the decision in the case at bar, while claims originating in the Sixth Circuit are settled on the basis of the Ohio decision. The decisions leave carriers in other cir-

cuits, as well as in these, in uncertainty as to the proper rule to follow in settlement of claims, and this uncertainty is emphasized by the fact that under the Carmack Amendment (Sec. 20) the initial carrier may be sued wherever jurisdiction over it may be obtained, or an intermediate or final carrier may be sued, upon common law principles, upon evidence showing its liability.

V. The clause in question is a standard clause of the uniform bill of lading, as revised June 2, 1915, pursuant to the report of the Commission of May 7, 1915, In re the Cummins Amendment, 33 I. C. C. Reps. 682, in which it was held (pp. 693, 697) that the clause was not unlawful under that amendment. Since June 2, 1915, it has been and still is, in general use by rail carriers throughout the United States.

The District Court found as a fact (p. 8, Finding 5):

"That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; and said tariff further provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs." And (Finding 6) that the contract or bill of lading issued in the case at bar, contained the clause in question.

The judgment of the Circuit Court of Appeals in the case at bar has the effect of nullifying the administrative action of the Interstate Commerce Commission taken by that body for the purpose of effecting uniformity in the treatment by carriers of shippers' claims. The commission has expressly approved the clause and has authorized its publication as a tariff provision as well as a provision of the uniform bill of lading. No sufficient reason appears of record for holding that this administrative action is outside the lawful function of the Interstate Commerce Commission.

VI. A vast volume of lawsuits will be obviated by a final determination in this court of the issues this action presents.

While this case, in itself, involves but a small amount, yet it is a test case the determination of which will govern the settlement of many hundred thousand claims now pending against carriers. Innumerable additional claims will inevitably arise out of the thousands of bills of lading carriers are issuing daily. Many million dollars are involved in the aggregate. The clause is uniform in intrastate bills of lading as well as interstate bills of lading. If this defendant and other carriers adhere to the clause, multifarious litigations will result because of the decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar. If the clause is abandoned, the carriers will pay out vast sums in claim settlements that they might not be required to pay under the law as this court would construe and apply it.

H. H. FIELD,

O. W. DYNES,

F. W. ROOT,

Counsel for Chicago, Milwaukee & St. Paul
Railway Company, Petitioner.

(1) From the record in 251 U. S. 549.

No. 1969b.

Notice of Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

Lillian B. Pembleton, Petitioner,

vs.

Illinois Commercial Men's Association, Respondent. }

To Andrew J. Ryan, James G. Condon, Thomas J. Condon
and Irwin I. Livingston, Attorneys for Respondent:

Please take notice that on Monday, December 22, 1919,
at the opening of court on that day, or as soon thereafter as

counsel can be heard, a motion for a writ of certiorari, of which a copy is annexed hereto, will be submitted to the Supreme Court of the United States, at the city of Washington, District of Columbia, for the decision of the court thereon. In support of said motion a petition and brief will also be presented to said court, copies of which are herewith served upon you.

Respectfully,
HARRISON MUSGRAVE,
W. S. OPPENHEIM,
Attorneys for Petitioner.

Service of the foregoing notice of motion is hereby admitted this — day of December, 1919.

_____,
_____,
Attorneys for Respondent.

No. 1969c.

Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

Lillian B. Pembleton, Petitioner,

vs.

Illinois Commercial Men's Association, Respondent. }

Now comes Lillian B. Pembleton, by Harrison Musgrave and William S. Oppenheim, her attorneys, and moves this Honorable Court that it should, by writ of certiorari or other process directed to the Honorable, the Judges of the Supreme Court of the state of Illinois, require said court to certify to this court for its review and determination a certain cause in said court lately pending wherein Illinois Commercial Men's Association was appellant and Lillian B. Pembleton was appellee, and to that end now tenders herewith her

petition and a certified copy of the entire record in said cause in said Supreme Court of Illinois.

HARRISON MUSGRAVE,
W. B. OPPENHEIM,
Attorneys for Lillian B. Pembleton, Petitioner.

Service of the foregoing motion is hereby admitted this
— day of December, 1919.

_____,
_____,
Attorneys for Respondent.

No. 1969d.

**Petition for Writ of Certiorari Where "Full Faith and Credit"
Denied and Decision of State Conflicts with Federal
Decisions.(1)**

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

Lillian B. Pembleton, Petitioner,

vs.

Illinois Commercial Men's Association, Respondent. }

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

The petition of Lillian B. Pembleton respectfully represents that on the 29th day of July, 1907, a certificate was issued by the Illinois Commercial Men's Association to George G. Pembleton, of Omaha, Nebraska, with benefit in the event of the member's death payable to your petitioner, his wife. Pembleton died on October 25, 1915, while a member in good standing in the association.

A claim was made by the petitioner as beneficiary on this certificate for the sum of \$5,000, in accordance with the

terms thereof. Payment was refused and suit was then brought in the District Court of Douglas County, Nebraska, and service was had upon one H. S. Weller, a member of the association, who under the Nebraska statute was its duly authorized agent. The appellant declined to appear and judgment was rendered in favor of the petitioner for the full amount of the claim.

Thereupon suit in debt was brought in the Circuit Court of Cook County, Illinois, upon this judgment and the respondent, after pleading the general issue, gave statutory notice of special matters of defense to be relied on at the trial, wherein it was stated that it had never engaged in business in the state of Nebraska, and that Weller was not an agent or employee of the association, and that therefore the supposed judgment obtained in the District Court of Douglas County, Nebraska, was void, because the court had no jurisdiction over the person of the respondent.

The respondent is an accident insurance company organized under the statutes of Illinois and is engaged in issuing certificates to members in all the states of the Union. It maintains an office in the city of Chicago, where it conducts its business through its officers and employees. It is not licensed to do business under the laws of any other state and has no paid agents or representatives in any other state. Its method of doing business is to receive applications for memberships from various states of the Union by mail, act upon these applications in the city of Chicago, and if accepted, then to mail a certificate to the member at the place of his abode. The method of securing applications is, when it forwards notices for the payment of dues to its members, to enclose blank applications and request the member to solicit other traveling men to make application and forward the sum of two dollars as a membership fee. (Abst. 27-37.) These applications with money enclosed are all forwarded by mail, received at Chicago, and when a membership cer-

tificate is issued, the same is forwarded to the member at his home address. (Abst. 33-34.) Thereafter all notices of dues, with like request for member to secure other applicants for membership, are forwarded by mail to the member at his home and the dues are paid by the member by sending the money through the mails to the association at its Chicago office. (Abst. 37.) Whenever an accident happens, or a member dies, and claim is made against the association, if any question is raised by the association as to its liability, an investigator or adjuster is sent to the place where the accident or death occurred. (Abst. 38-39.) He makes his report to the board of directors at Chicago, and if a proposition of settlement is made by the claimant, such proposition is reported to the board for action. (Abst. 39.) All transactions between the member and the association are conducted by mail, except in the case of an adjustment. It has a large membership in Nebraska. (Abst. 37-38.)

The Mr. Weller who had been served as the agent of respondent had within a few months prior thereto forwarded two applications to the respondent for memberships and enclosed in each instance a check for two dollars, being the requisite membership fee. (Abst. 54-57.) The applications and money were sent through the mails and were accepted by the respondent and the applications were made pursuant to the general request made by the respondent to all its members to urge traveling men to join.

The statute of Nebraska, which was in force at the time Pembleton became a member and has been ever since, provides as follows:

"Section 36. Agent Defined: Any person, firm or corporation in this state, who shall, with authority, receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall, with authority receive or receipt for money from other persons to be trans-

mitted to any such company or individual aforesaid, for a policy or policies of insurance, or any renewal thereof, although such policy or policies of insurance may not be signed by him or them as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance for or on account of such company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company." (Abst. 45.)

There being no conflict in the testimony in regard to the manner in which the company had done business or the acts of Weller in its behalf, the circuit judge instructed the jury to return a verdict in favor of the petitioner for the sum of \$6,848.43.

An appeal was taken to the Supreme Court of Illinois and the judgment of the Circuit Court was reversed without remanding. In its opinion the Supreme Court overrules its former decision in the case of *Firemen's Insurance Company v. Thompson*, 155 Ill. 204, and refuses to follow the decision of the Supreme Court of Nebraska against this respondent, rendered in the year 1909 in *Taylor v. Illinois Commercial Men's Association*, 84 Neb. 799.

That your petitioner is advised that said decision of the Supreme Court of Illinois is erroneous in that it refuses to give full faith and credit to the judicial proceedings of the state of Nebraska, in violation of Sec. 1, Art. IV, of the Constitution of the United States, and is a distinct departure from and in conflict with the decisions of this court.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Illinois, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of said court in the said cause entitled *Lillian B. Pembleton, Appellee, v. Illinois Commercial Men's Association, Appellant*, to the end that the said cause may be reviewed and determined by this court, as provided by law; and your petitioner

prays that the judgment of the said Supreme Court of Illinois in the said cause may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

LILLIAN B. PEMBLETON.

By W. S. OPPENHEIM,
HARRISON MUSGRAVE,
Attorneys for Petitioner.

(1) From the record in 251 U. S. 549.

No. 1969e.

Answer of Respondent to Petition for a Writ of Certiorari.(1)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

No. 625.

Lillian B. Pembleton, Petitioner,

vs.

Illinois Commercial Men's Association, Respondent. }

*On Petition for a Writ of Certiorari to the Supreme Court
of Illinois.*

Illinois Commercial Men's Association, by its attorney, answering the petition herein filed by Lillian B. Pembleton for a writ of certiorari, respectfully represents as follows:

The judgment recovered by default in the District Court of Douglas county, Nebraska, was lacking of due process of law because no jurisdiction was lawfully acquired over the respondent. Being void, it was not entitled to full faith and credit when sued on in the Illinois courts and inquiry into the jurisdictional facts was proper.

The facts and reasons showing that the judgment of the Nebraska state court lacked jurisdiction over the respondent are clearly stated in the opinion of the Supreme Court of Illinois. The previous decisions of this Honorable Court

cited are so clearly decisive of the single question raised by petitioner "as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

Wherefore, the respondent prays that the petition be dismissed with costs.

JAMES G. CONDON,
Attorney for Illinois Commercial Men's
Association, Respondent.

Dated at Chicago, Illinois, December 17, 1919.

(1) From the record in 251 U. S. 549.

No. 19691.

**Petition for Writ of Certiorari(1), Where Parties are Aliens,
and a Contract is Involved Providing for Arbitration,
a Valid Provision in the Countries of Which the
Parties are Citizens.**

SUPREME COURT OF THE UNITED STATES.

Aktieselskabet Korn-Og Foderstof
Kompagniet, Libelant,

vs.

Rederiaktiebolaget Atlanten,
Respondent-Petitioner.

To the Supreme Court of the United States:

The petition of Rederiaktiebolaget Atlanten respectfully shows to the court:

1. This is a petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York in an admiralty case.

2. Your petitioner on the 30th day of September, 1914, chartered the steamship Atlanten under the common government form of time charter for a voyage from the United States to Danish ports, but with the following clauses added:

"21. If any dispute arises the same to be settled by two

referees, one appointed by the captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an umpire. The decision of the arbitrators or umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

"24. Penalty for nonperformance of this agreement to be proven damages, not exceeding estimated amount of freight."

3. The charter-party will be found printed in the record, page 5. After the making of the charter-party, the conditions of the European war changed. Great Britain first materially modified the principles of international law in the order in Council of October 29, 1914. Immediately thereafter the seizure and detention of neutral vessels began. The British proclamation of November 2, 1914, gave "notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft and all other vessels, will be exposed to the greatest dangers, from mines which it will be necessary to lay, and from warships searching vigilantly, by night and by day, for suspicious craft." All vessels were required to enter the North Sea through Dover Strait, and a patrol was kept at both entrances of the North Sea to intercept vessels going to Danish and other ports which were accessible to Germany. Submarine operations did not become common until November, 1914, and the raids of the German fleet and other ferocities upon the British coast at Scarborough and other places did not begin until December, 1914. These changed conditions forced steamship owners to pay heavy war premiums, and made the charter a very serious loss to the owners. The owner claimed that under clause 24, above quoted, the parties had agreed that in case of nonperformance of the agreement, proven damages should be recovered not exceeding the estimated amount of freight, and offered to pay to the charterer

a sum equal to the total amount of the freight which would be earned on the charter-party, and desired to have the question whether it had a right to do so under the charter determined by arbitration. Instead of arbitrating the owner began suit in the United States District Court.

4. As is stated in the ninth article of the answer, page 17, libelant, the charterer, was a Danish corporation; the respondent, the shipowner, a Swedish corporation. The answer states that the charter-party was signed in Denmark and provided for arbitration in case of dispute, and that both by the law of Sweden and Denmark the arbitration clause was binding and was a condition precedent to the right of either party to sue the other (Articles Eleventh and Twelfth, pp. 17, 18).

5. The thirteenth article of the answer printed on page 18 of the record alleges that the respondent has been ready and willing at all times to arbitrate, but that the libelant has failed and neglected to do so, and the fourteenth clause of the answer states that under the law of Denmark and Sweden libelant had no right to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein, but was obliged to submit the same to arbitration in accordance with the terms of the charter-party (Record, p. 18).

6. The libelant excepted to the validity of these allegations of the answer.

7. The case involves a question of gravity and of importance in our general jurisprudence. Two foreigners have entered into a valid contract in Denmark, valid both by the law of Denmark and Sweden, where the respective corporations reside, that they will arbitrate disputes arising under the charter-party. The question is whether one of them can make this contract, solemnly entered into, an absolute nullity, by starting a proceeding in the United States court, a country with which they have no connection.

Your petitioner prays that this Honorable Court may be pleased to grant a writ of certiorari in this cause to the Circuit Court of Appeals for the Second Circuit, to bring up the cause to this Honorable Court for such proceedings therein as shall seem just, and that your petitioner may have such other or further relief and remedy in the premises as to this court may seem proper and in conformity with the laws of the United States, and your petitioner will ever pray.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner.

By HAIGHT, SANDFORD & SMITH,
JOHN W. GRIFFIN, Proctors for Petitioner.
Counsel for Petitioner.

County of New York, }
State of New York, } ss.

John W. Griffin, being duly sworn, says:

I am a member of the firm of Haight, Sandford & Smith, proctors for the petitioner herein.

I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one of its officers is that none of them is within the United States.

This application is made in good faith and not for the purpose of delay.

JOHN W. GRIFFIN.

Sworn to before me this 19th day of July, 1918.

BRENT W. BLYTHE,
Notary Public,
New York County, No. 175.

I do hereby certify that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable consideration of this court.

JOHN W. GRIFFIN.

(1) From the record in 252 U. S. 313.

No. 1969g.**Petition for Writs of Certiorari in Case Involving Conflicting
Claims of a Surety and the United States to a
Bankrupt's Estate.(1)**

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

The United States, Petitioner,
vs.
National Surety Company. } Nos. —.

The Solicitor General, on behalf of the United States, prays that writs of certiorari may issue to review two decrees of the Circuit Court of Appeals for the Eighth Circuit rendered in the above entitled cause December 10, 1919, being No. 201, original, and No. 5362 in said court.

THE FACTS.

On November 29, 1916, the Bald Eagle Mining Company, a corporation, was adjudged a bankrupt. The National Surety Company, respondent herein, on November 3, 1917, filed with the referee two claims for \$3,000 and \$150, respectively, which were allowed as general claims. The sums represented payments made by it as surety to the United States of the amounts of two bonds securing the performance of contracts of the mining company to furnish coal at Jefferson Barracks, Missouri, and to the United States Arsenal at St. Louis, Missouri, respectively, which contracts the bankrupt failed to perform.

On December 12, 1917, the United States filed with the referee its claim for \$9,912.84, representing the loss incurred by it, after deducting the \$3,000 paid by the surety company on account of the first-named bond, by reason of the default in performing the Jefferson Barracks coal contract. The referee allowed the claim as filed and ordered

that it be accorded priority over all other claims against the bankrupt with the exception of taxes and wages.

The surety company on March 12, 1918, filed with the referee motions to amend its claims for \$3,000 and \$150, asserting that under Revised Statutes, Sec. 3468, they were entitled to the same preference accorded that of the United States. Said motions were granted and the referee ordered that the claims of the surety company should share in the distribution of the assets of the insolvent pro rata with the claim of the government. (The assets of the estate available for distribution after payment of administration expenses were insufficient to pay in full the claims of the United States and the surety company.)

Thereafter the government filed petitions for a review of said orders by the District Court for the Eastern District of Missouri. Said District Court affirmed said referee's orders, and appeal was taken by the government to the United States Circuit Court of Appeals for the Eighth Circuit (No. 5362). A petition was also filed therein for revision of the orders and judgment complained of. (No. 201, original.) The Circuit Court of Appeals (Judge Hook dissenting) on December 10, 1919, affirmed the decree of the District Court.

THE STATUTES INVOLVED.

The material part of Sec. 3466, Revised Statutes, reads:

"Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; * * *"

The pertinent portion of Sec. 3468, Revised Statutes, is as follows:

"Whenever the principal in any bond given to the United States is insolvent, * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority for the recovery and receipt of the moneys out

of the estate and effects of such insolvent * * * principal as is secured to the United States; * * *

THE QUESTION INVOLVED.

Is a surety who has paid to the United States the full amount of his bond, which, however, is less than the amount due the government from the principal, a bankrupt, entitled to share pro rata with it (the United States) in the distribution of the assets of the bankrupt debtor, or is the claim of the United States superior and entitled to priority of payment?

REASONS FOR THE ALLOWANCE OF THE WRIT.

It is urged that the writs of certiorari should issue for the following reasons:

1. This is the first time that the question herein involved has ever been presented to this Honorable Court.

2. The question herein, decided below adversely to the government by a divided court, is one which will undoubtedly arise very frequently in the future owing to the large number of contracts into which the government is entering with private parties and for which surety bonds are given to secure the faithful performance thereof, and its correct settlement is of the greatest importance to the public business.

Wherefore it is respectfully prayed that this petition for writs of certiorari be granted.

ALEX. C. KING,
Solicitor General.

T. J. SPELLACY,
Assistant Attorney General.

March, 1920.

No. 1969h.

**Petition(1) for Writ of Certiorari in a Case Involving the
Question Whether Sending Telegraphic Message is
Interstate Commerce, Where There are Con-
flicting Decisions.**

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

Western Union Telegraph Company, Petitioner, }

vs. }

Addie Speight, Respondent.

To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States of
America:

The petition of the Western Union Telegraph Company
respectfully shows:

NATURE OF THE CASE.

This is an action originally brought in the Superior Court of Halifax county, North Carolina, by Addie Speight, the plaintiff therein, to recover of the Western Union Telegraph Company, defendant therein, damages for mental anguish alleged to have been sustained by the plaintiff, arising out of her failure to attend the funeral of her brother. The plaintiff alleged that her failure to attend the funeral was caused by the negligence of the Telegraph Company in changing the date of the telegram sent to her announcing the death of her brother, John Smith, and giving the date of his funeral. The change in the date of the telegram made it appear that the funeral took place on the day the telegram was received instead of on the following day, as appeared in the original message.

The jury rendered a verdict on all of the issues in favor of the plaintiff, and awarded the plaintiff one hundred dollars (\$100) damages for the mental anguish suffered by her.

The trial court set aside the verdict as a matter of law and not as a matter of discretion, and entered a judgment of involuntary nonsuit against the plaintiff. The plaintiff appealed to the Supreme Court of North Carolina, and that court held that the trial court had erred in setting aside the verdict and that the verdict should be allowed to stand as rendered by the jury. The Supreme Court thereupon issued its mandate to the lower court to enter judgment for the plaintiff upon the verdict rendered. In the opinion rendered by the Supreme Court of North Carolina, which appears in the record hereto attached, the Supreme Court disposed of all of the questions involved in the case and left nothing for the lower court to do except to enter judgment upon the verdict according to its mandate.

MAIN POINT INVOLVED IN THE CASE.

The main point in the case is whether the telegraphic message in question is to be considered as an intrastate message so as to render the Telegraph Company liable to the plaintiff for damages arising out of mental anguish, or whether the message is to be considered as an interstate message—that is, whether it constitutes interstate commerce. If it is held to be an interstate message, then it is admitted that the plaintiff is not entitled to recover damages for mental anguish, which is the sole damage claim, and it is also admitted that the action should be dismissed. The message was sent from Greenville, North Carolina, addressed to the plaintiff at Rosemary, North Carolina. It appeared in the case that Roanoke Rapids was the delivery point for telegrams destined for Rosemary, there being no telegraph office at Rosemary.

It is set up in the answer of the defendant, and it is admitted in the replication of the plaintiff, quoted above, that the message in question was actually transmitted from Greenville, N. C., through Richmond, Va., and Norfolk, Va., to

Roanoke Rapids—that is, it is admitted that interstate commerce was utilized in the actual transmission of the message.

The undisputed evidence showed that the route used in the transmission of the message—that is, through Richmond and Norfolk, Va., relay stations—was the route which had been actually used in the transmission of like messages for more than ten years.

The undisputed evidence showed that there was no direct and continuous wire from Greenville, N. C., to Roanoke Rapids, the telegraph station for Rosemary.

There was no allegation or proof that there was any delay in the delivery of the message, and all of the evidence showed that the route over which the message was actually sent was the quickest way to send the message from Greenville to Roanoke Rapids.

In other words, the question presented to the court in this case, concisely stated, is this:

Where a telegraphic message originates at one point in a state, destined to another point in the same state, is actually transmitted over the route which is usual and customary in the transmission of messages between these two points, and this causes the message to be transmitted over wires and through relay points in another state, is such a message thus transmitted an interstate message—that is, does it constitute interstate commerce?

PROCEEDINGS IN TRIAL COURT.

The pleadings in the cause, and particularly the answer of the defendant, which appears in the record, shows that the defendant particularly set up as a defense that the message was transmitted over the usual and customary route for the transmission of messages from Greenville to Roanoke Rapids (Roanoke Rapids being the delivery point for Rosemary), this route being from Greenville to Richmond, Va., a relay point, thence to Norfolk, Va., another relay point, and thence to Roanoke Rapids, and that the message was therefore an

interstate message—that is, that the transmission of the message constituted interstate commerce.

The defendant further set up the Act of Congress of June 18, 1910, by which Congress provided that the United States should enter upon and assume charge of the regulation of the field of interstate commerce by telegraph, and the defendant set up that it had complied with the Act of Congress.

The defendant further set up that the message in question was an *unrepeated message*, sent subject to the conditions on the back of the telegram.

The following issues were submitted to the jury and answered as follows:

1. Was the message sued on sent out of the state of North Carolina into the state of Virginia for the purpose of fraudulently evading liability under the law of North Carolina?

Answer: "Yes."

2. Was the message negligently changed in transmission by the defendant?

Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover?

Answer: "\$100."

Counsel for the Telegraph Company during the progress of the trial and in apt time moved for judgment of nonsuit, which the trial court at that time overruled, and the defendant's counsel also moved for peremptory instructions directing the jury to answer the first issue "No," and the third issue "Nothing." Counsel further requested the court to charge the jury that inasmuch as this was an unrepeated message, in no event was the plaintiff entitled to recover more than the charge for sending the telegram.

The trial court submitted all the issues to the jury under the charge which is fully set out in the record and attached hereto, but after the rendition of the verdict defendant's counsel moved to set the verdict aside and moved for judgment of nonsuit, basing the motion upon the ground that the

message in question constituted interstate commerce, and that the plaintiff was not entitled to recover any damage whatever for mental anguish.

The trial court reconsidered the matter after the rendering of the verdict, and thereupon the judge presiding signed a judgment setting aside the verdict as a matter of law and adjudged that the plaintiff be nonsuited.

Thereupon both the plaintiff and the defendant appealed to the Supreme Court of North Carolina. The plaintiff appealed from the judgment rendered against her, and the defendant out of an abundance of caution and in accordance with the practice obtaining in North Carolina, in order to bring up for review the rulings of the court during the progress of the trial.

The contention of the petitioner is that inasmuch as the pleadings in the case, and particularly the replication filed by the plaintiff, admit that the telegram in question was actually transmitted through two states, this was an admission that the transmission of the message constituted interstate commerce. The petitioner further contends that the findings of fact by the jury on the first issue and the statements of fact upon which the Supreme Court of North Carolina based its ruling, are unsupported by any testimony in the case, and for that reason it may become necessary for this Honorable Court to examine into the facts, under the ruling in *Creswell v. Grand Lodge Knights of Pythias*, 225 U. S. 246, to the effect that wherever it is claimed that a federal right has been denied as a result of the findings of fact, and it is contended that there was no evidence in the case to support the findings, then it becomes the duty of this court to examine the record in the case to ascertain whether there was any evidence to support the findings of fact.

Conceding, then for the sake of argument, and for that purpose only, that the facts stated below are material, we now show the court that by the undisputed evidence these facts are established:

1. *That the message in question was actually transmitted from Greenville, N. C., through Richmond, Va., and Norfolk, Va., to Roanoke Rapids, the telegraph station for Rosemary.*

2. *That the route over which the message was sent was the usual and customary route for the transmission of messages between these points and was the route which had been used for many years.*

3. *The route over which the message was transmitted was the quickest way in which it was possible for the Telegraph Company to have transmitted and delivered the message.*

4. *That there was no direct and continuous wire over which the message could have been transmitted wholly within the state of North Carolina; that in any event it would have been necessary to relay the message at Weldon, which was not a relay station, and the relaying of the message at Weldon would have retarded the transmission and delivery of the message.*

5. *That there was no evidence to support the finding of the jury that the message was sent through Virginia for the purpose of fraudulently evading the law.*

EVIDENCE BRIEFLY ANALYZED.

As bearing upon these questions there were but three witnesses, one for the plaintiff, C. E. Williamson, and two for the defendant, E. M. Kilpatrick and J. L. Bundy.

Plaintiff's witness Williamson's testimony will be found on pages 18-20 of the record in defendant's appeal. This witness testified on his direct examination that there was a route to send the message direct from Greenville to Weldon, and from Weldon to Roanoke Rapids, yet on his cross-examination he distinctly and clearly stated that to send the message from Greenville via Weldon to Roanoke Rapids was not the quickest and promptest route, although it was the most direct. He explained that if the Greenville operator wanted the Weldon operator, the Greenville operator would

first have to call the Richmond operator, ask the Richmond operator to call the Weldon operator, and the latter would then "cut in" on the Roanoke Rapids wire. The witness explained that the manner in which this particular telegram was sent—that is from Greenville to Richmond, Richmond to Norfolk, and Norfolk to Roanoke Rapids—had been the custom ever since he had known anything about it, which was ten years; that Norfolk was the relay point for Roanoke Rapids.

Defendant's witness Kilpatrick (Record, page 41) testified clearly as to the necessity from a practical standpoint of sending the message exactly as it was sent, and testified that it was not possible under the system adopted by the company for the message from Greenville to Roanoke Rapids to go other than through Norfolk. He testified further that this had been the custom of the Telegraph Company as long as he had been in the business, for at least seventeen years.

Defendant's witness Bundy explained in detail the necessity for sending the message as it was sent. He explained fully the nature of the relay offices and the necessity for having them in order to avoid congestion.

All of the witnesses in the case, both for the plaintiff and the defendant, testified most positively that the way in which the message was sent was the quickest way to send it, and was the route that had been in use for from ten to seventeen years.

There was not a line of testimony from any witness showing that the company adopted this method from any motive to evade the state law, and not a line of testimony upon which any charge of fraudulent evasion could be based.

The respondent's counsel seemed to rely upon the fact that the wires over which the message was transmitted went through the Weldon office, both in going to Richmond and also in being transmitted from Norfolk to Roanoke Rapids, but in this connection your petitioner wishes to emphasize that all of the evidence in the case shows that these wires

going through the Weldon office were there *for test purposes only*, and were not intended to be used by the Weldon operator for receiving or transmitting messages. All of the evidence shows that the only possible way the Weldon operator could use these wires was to "cut in" with his plug, and while it was possible for him to do this he was not expected to use these through wires in the transmission of messages.

The other evidence appearing in the case shows that the defendant complied with the Act of Congress and shows that the telegram in question was sent as an *unrepeated message*, subject to several limitations, one of them being that no recovery could be had for more than the cost of the message, but as this action is brought by the sendee there was no claim for the recovery even of the toll paid.

OPINION OF THE COURT BELOW.

The opinion of the chief justice of the court below seems to have been concurred in by Mr. Justice Hoke. The minutes of the Supreme Court (Record, page 1) show that Mr. Justice Walker concurred in the result. Mr. Justice Allen dissented, though he filed no dissenting opinion, and Mr. Justice Brown was absent and did not participate in the hearing or in the decision of the case.

Petitioner filed a petition to rehear, which, under the rules of the Supreme Court of North Carolina, was referred to Mr. Justice Walker and Mr. Justice Brown. This petition to rehear was considered and denied on the 18th of November, 1919, because of the fact that the justices did not agree, Mr. Justice Brown being of the opinion that the rehearing should be granted, and Mr. Justice Walker deciding that the case should not be reheard.

Your petitioner respectfully submits that there are several statements in the opinion of Chief Justice Clark as to the facts of the case which are wholly unsupported by the testimony. It is stated in the first part of the opinion that there was a continuous and direct route for the transmission of

messages from Greenville to Rosemary, but an examination of the evidence will show that the witnesses testified that there was no such direct and continuous route, and that while it was *possible* to relay the message at Weldon, this was not the quickest route and not the route which was in use by the company.

The crux of the decision of the Supreme Court of North Carolina is probably found in this extract from the opinion of the chief justice:

"Whether commerce between two points in the same state is intrastate depends primarily upon whether both termini are in this state, and the only exception is when it is necessary to cross through the territory of another state in passing from the initial point in this state to pass to the terminal point also in this state."

Your petitioner respectfully shows to the court that this is a case of great importance to your petitioner, arising out of the fact that, as appears from the evidence in this case, Richmond, Va., and Norfolk, Va., are relay points for many telegrams originating in North Carolina and destined for other points in the same state. It may be admitted by your petitioner that it is *possible* to send some of these messages upon wires wholly within the state of North Carolina, but, as shown by the testimony in this case, the sending of such messages over wires wholly within the state would cause great delay and congestion and seriously injure your petitioner's business and prevent the quickest transmission of the messages. If the opinion of the Supreme Court of North Carolina is to stand as the law regulating your petitioner's conduct in the transmission of messages from one point to another within the state, it will result in great loss to your petitioner, and will retard and obstruct the quick and prompt transmission of messages between many points.

Your petitioner shows the court in the brief hereto attached that the opinion of Chief Justice Clark is founded upon decisions that have been discredited and overruled by

this Honorable Court and also by a former opinion of the Supreme Court of North Carolina. The petitioner further shows that questions similar to this in the matter of common carriers of freight have been passed upon by this Honorable Court, and further, that the identical question now submitted to the court has been passed upon by the courts of last resort in various states in the United States, and in every instance the opinions of these courts have upheld the contention now made by your petitioner. It will appear, therefore, that if the decision of the Supreme Court of North Carolina is permitted to remain unreversed, the result will be brought that a message originating at one point in North Carolina and transmitted to another point in the same state through a neighboring state, will be held in North Carolina to be intrastate commerce, while another message originating in some other state and destined to another point in the same state, transmitted through a neighboring state, under identically the same conditions and circumstances, will be held in the other states to be interstate commerce.

It is respectfully submitted by petitioner that it is necessary that this Honorable Court settle the question, not only on account of its importance, but also on account of the fact that the decision of the Supreme Court of North Carolina conflicts with the decisions of so many other courts of last resort.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the state of North Carolina to the end that the judgment of the Supreme Court of North Carolina may be reviewed and reversed by this Honorable Court.

WESTERN UNION TEL. CO.,
Petitioner.

By FRANCIS R. STARK,
W. E. DANIEL,
CHAS. W. TILLET,
Counsel for Petitioner.

No. 19691.**Notion of Motion for Leave to Intervene as Amicus Curiae.**

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1918.

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| Rederiaktiebolaget Atlanten, Petitioner, | } No. 567. |
| vs. | |
| Aktieselskabet Korn-Og Foderstof | |
| Kompagniet. | |

Sirs:

Please take notice that upon the annexed petition and brief, I shall apply to the Supreme Court of the United States, at Washington, D. C., at the next motion day of said court, on the first day of March, 1920, at the opening of the court or so soon thereafter as counsel can be heard, for leave to intervene herein as amicus curiae and to file the accompanying brief, and to be otherwise heard upon the argument in such manner as the court deems proper.

Dated, February 20, 1920.

Yours, etc.,

JULIUS HENRY COHEN,
Counsel for the Chamber of Commerce
of the State of New York, 111
Broadway, New York.

To:

HAIGHT, SANDFORD & SMITH,
Proctors for the Petitioner-Appellant.

To:

BURLINGHAM, VEEDER, MASTEN & FEARY,
Proctors for the Libellant-Respondent.

No. 1969j.**Petition for Leave to Intervene as Amicus Curiae.(1)**

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1918.

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|--|------------|
| Rederiaktiebolaget Atlanten, Petitioner, | } No. 567. |
| vs. | |
| Aktieselskabet Korn-Og Foderstof | |
| Kompagniet. | |

To the Supreme Court of the United States:

The petition of the Chamber of Commerce of the State of New York respectfully shows to the court:

I. Your petitioner is the oldest commercial or trade body in the United States. Its charter was granted by George the Third, April 5, 1768, and the act confirming it was one of the first pieces of legislation passed by the state of New York, Chapter XXX, Laws of 1784, passed April 13, 1784.

II. From its very earliest date, the Chamber has taken an active interest in the arbitration of commercial disputes. During the Revolutionary War and prior to Cornwallis' surrender, while the city of New York was still under martial law, Andrew Elliot, superintendent-general, wrote (October 2, 1781): "As I was and still am of opinion that mercantile disputes can not be adjusted in a more proper or more equitable way than by a reference to respectable merchants, it gave me great satisfaction when the method was so generally agreed to, and I flattered myself that notwithstanding the trouble it gave individuals, that it would at least continue as long as I had any concern in the superintendency. I shall be much concerned if these, my expectations, should be disappointed. The present juncture of affairs does not seem favorable for any new plans to be adopted. It has long been proposed (I hope events are not distant that may admit of a trial) to revive such part of the civil authority by which justice may be administered to

the community. Individuals will then be freed from the burthen of adjusting mercantile disputes, and I shall be relieved from a most fatiguing anxious situation, but I beg you will assure the chamber of commerce that in all situations I shall ever retain the highest sense of assistance and support they have afforded me."

III. From 1874 down to 1895, the Chamber of Commerce housed the Court of Commerce or Court of Arbitration established by the legislature of the state of New York in April, 1874, over which court the late Judge Enoch L. Fancher presided. Herein partnership cases, claims for salaries, cases arising on bills of lading, on shipments of goods from abroad, on marine insurance, etc., etc., were submitted to the arbitrator and satisfactorily disposed of.

IV. In 1911 a special committee on commercial arbitration, consisting of the following: James Talcott, Henry Hentz, Frank A. Ferris, Alexander E. Orr, Charles L. Bernheimer, chairman, recommended the plan for commercial arbitration which the Chamber put in operation and has since operated with great success. This plan is based upon provisions of the Code of Civil Procedure of the state of New York, permitting voluntary submissions to arbitration and providing for the entry of a judgment upon the award and the enforcement of the judgment as a judgment of a court of record (Chapter 17, Title VIII, of the Code of Civil Procedure, state of New York).

V. In the year 1915 the decision in the case of U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006, which followed the decisions of your Honorable Court, held it was still in law in this country that a clause in a contract by which parties agreed to submit their differences to arbitration was revocable at the pleasure of either party. This decision came to the attention of the London Court of Arbitration. Shortly after its rendition, the London court called the attention of your petitioner to the fact that if the decision of Judge Hough in that case were not

reversed on appeal or the law changed, "a citizen of the United States of America would be in the position to enforce an award in his favor wherever delivered against a British subject, whether resident in England or any British colony or dependency * * * whereas, should the award go against him, he could ignore it." The London Court of Arbitration further reported that "Recourse to arbitration in this country (England), is very general, and it is a gratifying tribute to the efficiency with which justice is administered in the London Court of Arbitration, that foreign merchants readily assent to the insertion in their contracts of a clause providing for the reference of differences thereto."

VI. Believing that the matter of the irrevocability of contracts, including the irrevocability of an agreement to submit a controversy to arbitration, was a matter vital to the trade and commerce of our country, your petitioner caused to be made a study of the questions of public policy and law involved in the matter, with the idea ultimately of submitting such study as *amicus curiae* to any court in which this question might again arise. This study is now in the form of a publication entitled "Commercial Arbitration and the Law" and was prepared by the counsel for your petitioner.

VII. Your petitioner is advised that there is presented once again for the consideration of this court upon the appeal herein this question of the irrevocability of an arbitration agreement, arising in this instance out of a clause in a time charter as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an umpire. The decision of the arbitrators or umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liqui-

dated damages, the estimated amount of chartered freight.

"24. Penalty for nonperformance of this agreement to be proven damages, not exceeding estimated amount of freight."

VIII. Your petitioner respectfully asks leave to file with the court, for the use of the members thereof, copies of the said publication, "Commercial Arbitration, and the Law," for leave to intervene herein as *amicus curiae* and to submit the annexed brief, and, if it please the court, in view of the grave importance of this subject to interstate and international commerce, that its counsel be heard orally.

All of which is respectfully submitted.

CHAMBER OF COMMERCE OF THE
STATE OF NEW YORK,

By JULIUS HENRY COHEN,

February 20, 1920.

Its Counsel.

(1) From the record in 252 U. S. 313.

For "*amicus curiae*" see Bouvier's Law Dictionary, 3rd Revision; *In re Columbia Real Estate Co.*, 101 Fed. 965; *Martin v. Tapley*, 119 Mass. 116; *Birmingham Loan & Auction Co. v. First National Bank*, 100 Ala. 249; *Taft v. Northern Transportation Co.*, 56 N. H. 414.

On leave to file brief, see *Northern Securities Co. v. U. S.*, 191 U. S. 555, 48 L. Ed. 299, where it was denied chiefly because parties objected, parties were competently represented, and it did not appear that the applicant was interested in any case which would be affected by the decision of the instant case.

No. 1969k.

Motion to Advance Case.(1)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

Chicago, Milwaukee & St. Paul Railway
Company, Petitioner,

vs.

McCaull-Dinsmore Company, Respondent.

} No. 628.

Now comes the Chicago, Milwaukee & St. Paul Railway Company, petitioner, and moves this Honorable Court to

advance this cause for early hearing and determination, within the contemplation of paragraphs 5 and 7 of Rule 26 of the published rules of this court, and in support of this motion submits the following:

First. The case is one in which the United States are concerned in that its final determination by this court will necessarily govern the treatment of many thousand claims against the United States Railroad Administration similar in nature and principle to the case at bar. Said claims against the United States Railroad Administration involve in aggregate a vast sum of money that must be paid out of the funds of the United States government, if the judgment in the instant case is affirmed.

Second. The case involves an action for loss of an interstate shipment of grain. The facts are agreed upon and presented in the record in the form of a stipulation by the parties. The shipment was made under a bill of lading or shipping contract wherein it was provided that:

"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid." (Trans. 6.)

The contract of shipment conformed to the provisions of the legally published tariffs filed with the Interstate Commerce Commission which tariffs provided, among other things, a rate of transportation based on and controlled by said form of bill of lading and that in cases where the shipper was not agreeable to shipping under the terms of such form a higher rate would be charged.

The petitioner admitted the loss and its liability therefor upon the basis of said clause, to-wit: the value of the property at the place and time of shipment, and the petitioner has paid the respondent an amount representing such value. (p. 6.) Respondent claimed the value of the wheat at destination at the time when it should have been delivered there with interest less freight charges. (p. 2.) The amount

sued for is the difference between the amount thus claimed by respondent and the amount paid by petitioner, to-wit: \$221.63, with interest.

Third. The cause was tried in the District Court upon the pleadings and stipulation of facts and that court found in favor of respondent. (252 Fed. 664.) Upon judgment being entered on that finding a writ of error was sued out of the Circuit Court of Appeals. The latter tribunal affirmed the judgment on September 22, 1919. (pp. 19-21.) Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dismore Company, 260 Fed. 835.

Fourth. The case is one involving general public interest for the reason that substantially all of the railroads of the United States are using a uniform or standard bill of lading containing the clause quoted in paragraph *Second, supra*, and claims of innumerable shippers aggregating many hundred thousand in number, a part of which arose prior to federal control and a part during federal control, are outstanding and will in the main await disposition depending upon the decision of this court in the case at bar.

Fifth. The standard form of bills of lading is still in use and additional claims of shippers are daily accumulating.

Sixth. The standard bills of lading that have been and now are in use provide a period of limitations within which suits may be brought and if the case at bar awaits its regular turn on the calendar, many thousand claims will need be put in suit in order to toll the period of limitations. A vast number of such suits, with their attending costs in time and money, will be obviated if the cause is advanced in accordance with this motion.

Seventh. We are advised that the United States Railroad Administration, by its proper legal officer, will ask leave to join in this motion.

We are advised by the chairman of the Interstate Commerce Commission it is the desire of that body the cause be advanced, and we are advised it is agreeable to the respondent that an order advancing the cause be entered.

A more detailed statement of the case is contained in the petition of petitioner on file in this cause and on which this court issued a writ of certiorari.

Respectfully submitted,

H. H. FIELD,

O. W. DYNES,

F. W. ROOT,

Counsel for Petitioner.

(1) From 251 U. S. 549. See Supreme Court Rule No. 26.

No. 19691.

Motion by the United States to Advance.(1)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

| | | |
|--------------------------------|---|-------------------|
| The United States, Petitioner, | } | Nos. 779 and 780. |
| vs. | | |
| National Surety Company. | | |

On writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Comes now the Solicitor General, and respectfully moves that the above entitled cases, in which writs of certiorari were granted on April 19th last, be advanced for early hearing during the October, 1920, term of this court.

The question involved herein is whether a surety company which has paid to the United States the full amount of its bond, which, however, is less than the amount due the government from the principal, a bankrupt, is entitled to share pro rata with it (the United States) in the distribution of the assets of the bankrupt debtor, or whether the claim of the United States is superior and entitled to priority of payment. The decision of this question is dependent upon the construction given Revised Statutes, Secs. 3466 (Comp. Stat., 1916, Sec. 6372) and 3468 (Comp. Stat., 1916, Sec.

6374)—the former section providing that debts due the United States shall be first satisfied out of the insolvent's estate; the latter providing that when a surety has paid to the United States the amount due upon the bond of his principal, an insolvent, he shall have the "like priority" secured to the government for the recovery and receipt of said amount out of the estate and effects of such insolvent.

Owing to the large number of contracts into which the government is daily entering with private parties for which surety bonds are given to secure the faithful performance thereof, the question presented herein will undoubtedly arise very frequently in the future, and its correct settlement is of the greatest importance to the public business. It is requested, therefore, that an early hearing be had in these cases.

Counsel for the respondent concur in this request for advancement.

ALEX. C. KING,
Solicitor General.

May, 1920.

(1) From the record in 252 U. S. 576.

No. 1969m.

Notice of Motion to Place on the Summary Docket.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

| | |
|----------------------------------|------------|
| Western Union Telegraph Company, | } No. 712. |
| Petitioner, | |
| vs. | |
| Addie Speight, Respondent. | |

To Addie Speight and to Her Counsel:

You will take notice that on Monday, May 17, 1920, counsel for petitioner will present to the Supreme Court of the

United States in the city of Washington a motion, copy of which is hereto annexed.

This April 26, 1920.

WESTERN UNION TELEGRAPH COMPANY,
By CHARLES W. TILLET,
Counsel for Petitioner.

Service of foregoing notice together with copy of motion attached is acknowledged, this the 26th day of April, 1920.

ADDIE SPEIGHT,
By MURRAY ALLEN,
Counsel for Respondent.

No. 1969n.

Motion to Place on the Summary Docket.(1)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1919.

| | |
|--|------------|
| Western Union Telegraph Company, Petitioner, vs. Addie Speight, Respondent. | } No. 712. |
|--|------------|

Comes now the Western Union Telegraph Company, petitioner, and moves this Honorable Court that this cause be transferred for hearing to the summary docket, for the following reasons:

1. In this cause the petitioner presented to this court on March 1, 1920, a petition for a writ of certiorari to the Supreme Court of North Carolina, and on the following Monday, March 8, 1920, this Honorable Court allowed the petition, and the cause is now before the court for a hearing.

2. In this cause the Supreme Court of North Carolina held the plaintiff entitled to recover \$100.00 damages for mental anguish alleged to have been suffered by her on ac-

count of her failure to attend the funeral of her brother, she averring that her failure to attend the funeral was caused by the negligence of the Telegraph Company in misdating the telegram which was made the basis of the action; it was shown by all the evidence that the telegram originated at one point in North Carolina, destined to another point in North Carolina, but that the message was relayed through the city of Richmond, in the state of Virginia, and that that had been the customary route for transmitting messages between these points for more than ten years.

The point involved in the case is as to whether the message is an interstate message or an intrastate message, there being no dispute but that if the court holds the message in question to be an interstate message the judgment of the Supreme Court of North Carolina should be reversed.

3. This is not a cause which will require any extended argument for that it is submitted that this Honorable Court has in effect decided the point involved in this case in the two recent cases before this court, viz., *Postal Telegraph Co. v. Warren-Godwin Lumber Company* and the case of *Western Union Telegraph Company v. Boegli*, decided January 12, 1920. In the *Boegli* case the chief justice referred to cases cited in the former opinion and said that certain cases from the state courts were "*approvingly cited*." Among these cases "*approvingly cited*" are several cases that involve the identical point involved in this case, among them being *Western Union Telegraph Company v. Lee*, 174 Ky. 210. Numerous other decisions are cited in the brief presented when the petition for certiorari was filed, and to which the court is respectfully referred.

4. The petitioner shows to the court that as a consequence, following the decision of the Supreme Court of North Carolina in the above entitled cause and the decision of the same purport in the case of *Watson v. Telegraph Company*, later decided by the Supreme Court of North Carolina (copy of which opinion is filed with the record in

this case), numerous suits have been brought against petitioner upon messages originating in the state of North Carolina, destined to points in the same state but transmitted through relay stations outside of the state, and the judges hearing these causes are following the decision of the Supreme Court of North Carolina in the cases above referred to and are holding that such messages are intrastate messages, and the plaintiffs are being allowed to recover damages for mental anguish and other damages in violation of the rule laid down for recovery in respect to interstate messages. The petitioner will be compelled to bring all of these cases by petitions for certiorari addressed to this court in order to avoid paying the unjust and unreasonable judgments for mental anguish that are being rendered against the petitioner, and in this way it will be necessary to vex this Honorable Court with frequent petitions for certiorari in cases of this identical kind.

If this Honorable Court will place this cause upon the summary docket for hearing, the petitioner submits with confidence that this court will reverse the Supreme Court of North Carolina, and will thus put an end to all suits of this character.

5. The petitioner further shows the court that there are suits pending in other states of the Union besides North Carolina, and these courts are being urged upon the authority of the case at bar to hold that messages of this character are intrastate messages and not interstate messages, and the courts are being urged to award damages for mental anguish in such cases in accordance with the rules prevailing in such states with respect to intrastate messages.

FRANCIS R. STARK,
CHARLES W. TILLET,
Counsel for Western Union Telegraph
Company, Petitioner.

(1) From the record in 252 U. S. 576. Supreme Court Rule No. 26, par. 6.

**CERTIFICATE OF QUESTIONS TO THE SUPREME
COURT BY A CIRCUIT COURT OF APPEALS.**

No. 1970.

**Order to Certify Questions by Circuit Judges to the Supreme
Court (1).**

The United States Circuit Court of Appeals,
for the ———.Circuit.

A. B., Appellant, }
 vs. }
C. D., Appellee. }

Appeal from the District Court of the United States for the
—— district of ——.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions arising upon the record, and the doubt which the court have as to the correct decision thereof, that [*three*] questions arising on said appeal shall be certified in the Supreme Court of the United States for its instruction thereon, and that accompanying said questions there shall also be certified a statement from which such questions can be understood; which statement and questions are as follows: [*here set forth statement and questions in full.*]

[*Signed by all the Judges.*]

(1) The Judicial Code, Sec. 239, provides that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon

shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The questions to be certified under this provision rest within the discretion of the Circuit Courts of Appeals. It is not a discretion the exercise of which may be invoked by a party as of right. The certification is for the instruction of the court upon doubtful questions. In cases of magnitude and upon indirect and doubtful questions of law the court, upon the argument, may properly indulge the suggestions of counsel as to the desirability of the advice and instruction of the Supreme Court. It is not, however, good practice to file a motion for a certificate, nor will the court usually grant such a motion. *Louisville, etc., Ry. Co. vs. Pope*, 74 Fed. Rep. 1; *Andrews vs. Nat'l Foundry & Pipe Works*, 77 Fed. Rep. 774; *Pullman Pal. Car Co. vs. Cent. Transp. Co.*, 83 Fed. Rep. 1. But see *Farmers' & Merchants' State Bank vs. Armstrong*, 49 Fed. Rep. 600. Unless the Circuit Court of Appeals is in doubt with reference to some question of law, and asks for information, the Supreme Court will not undertake the certificate. *Columbus Watch Co. vs. Robbins*, 148 U. S. 266. The Circuit Court of Appeals will not ordinarily certify a question in advance of the argument, *Louisville, etc., Ry. Co. vs. Pope*, 74 Fed. Rep. 1, nor after it has decided the case. *The Majestic*, 69 Fed. Rep. 844. The Circuit Court of Appeals may certify certain questions in a case and file an opinion on other points in the same case. *Sigafus vs. Porter*, 84 Fed. Rep. 430; *McCormick Harvesting Machine Co. vs. Aultman*, 69 Fed. Rep. 371; *Compton vs. Jesup*, 68 Fed. Rep. 263 S. C. on certificate, 167 U. S. 1. In such cases the final decree or judgment will await the decision of the Supreme Court.

In certifying a question or proposition of law to the Supreme Court the certificate should be entitled in the Circuit Court of Appeals, and should contain such a statement of the facts as may be necessary to the determination of the questions of law certified. It should not contain the whole record.

A certificate should not in effect certify the whole case to the Supreme Court, but only certain questions or propositions of law, unmixed with questions of fact or of mixed law and fact. *Cross vs. Evans*, 167 U. S. 60; *Graver vs. Fautot*, 162 U. S. 435; *U. S. vs. Union Pac. Ry. Co.*, 168 U. S. 505; *Warner vs. New Orleans*, 167 U. S. 467. The certificate should show that the instruction of the Supreme Court is desired in the particular case upon a particular question as to the proper decision. *Columbus Watch Co. vs. Robbins*, 148 U. S. 266. The questions propounded should present distinct points or propositions clearly stated so that each can be distinctly answered without reference to other issues of law involved in the case. *U. S. vs. Union Pac. Ry. Co.*, 168 U. S. 505; *McHenry vs. Alford*, 168 U. S. 651; *Warner vs. New Orleans*, 167, U. S. 467.

The certificate should be signed by the judges constituting the Circuit Court of Appeals sitting in the particular case. The clerk of the Circuit Court of Appeals attaches to this certificate a certificate to the effect

that the certificate was duly filed and entered of record in the clerk's office by order of the court, and, as directed by the court, the certificate is forwarded to the Supreme Court for its action thereon.

The certificate, including a statement of facts, is transmitted to the clerk of the Supreme Court and filed and docketed by him. The case is set down for argument upon the certificate like a case upon an appeal or writ of error. Counsel are permitted to file briefs and make oral arguments.

Upon the determination of the Supreme Court a certificate of its answers to the propositions of law, under the hand and seal of the clerk of the Supreme Court, is sent to the Circuit Court of Appeals. In case the Circuit Court of Appeals has decided the other questions at issue in the case, a decree may be usually entered upon the certificate without further argument. In case the Circuit Court of Appeals desires further argument, it may order the whole case reargued in view of the certificate of the Supreme Court. In any case the final decree is entered in the Circuit Court of Appeals from which the question was certified.

Jurisdiction to certify is based upon Sec. 239 of the Judicial Code; this deals with certification by the Circuit Court of Appeals to the Supreme Court and must, of course, be construed in connection with Secs. 128 and 238.

The request for instructions must relate to matters over which the Circuit Court of Appeals has jurisdiction. *Billings v. U. S.*, 232 U. S. 261, 58 L. Ed. 596.

In *U. S. v. Mayer*, 235 U. S. 55, 59 L. Ed. 129, the Supreme Court held that it was proper to certify the question whether the Circuit Court of Appeals could prohibit the District Court from vacating a judgment of conviction in a criminal case after the term.

Affirmance by balanced vote in the Supreme Court will not bar another Circuit Court of Appeals from certifying the same question, especially when a third Circuit Court of Appeals has decided the same question in a contradictory manner. *Hertz v. Woodman*, 218 U. S. 205, 54 L. Ed. 1001.

There is much later as well as earlier authority against certifying the whole case. *Sou. Pac. Co. v. I. C. C.*, 215 U. S. 226, 54 L. Ed. 169; *Chi., etc., Ry. Co. v. Williams*, 214 U. S. 492, 53 L. Ed. 1058; *The Folmina*, 212 U. S. 354, 53 L. Ed. 546; *U. S. v. Mayer*, 235 U. S. 55, 59 L. Ed. 129.

Of course the certificate must be made before the case is decided, and may be requested if court does not act of itself. *Dickinson v. U. S.*, 174 Fed. 808, 98 C. C. A. 516; *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608. But contra on the right to request. *L. & N. R. Co. v. Pope*, 74 Fed. 1, 20 C. C. A. 253.

For illustrative cases setting forth certificates in whole or in part, see *Seim v. Hurd*, 232 U. S. 420, 58 L. Ed. 667; *Quinlan v. Green Co.*, 205 U. S. 410, 51 L. Ed. 860; *Hills v. Hoover*, 220 U. S. 329, 55 L. Ed. 485; *U. S. v. Sherman Co.*, 237 U. S. 146, 59 L. Ed. 883; *U. S. v. Midwest Oil Co.*, 236 U. S. 459, 59 L. Ed. 673; *Burke v. Sou. Pac. Co.*, 234 U. S. 669, 58 L. Ed. 1527. As to form, see *Hertz v. Woodman*, 218 U. S. 205, 54 L. Ed. 1001; *Quinlan v. Green Co.*, 205 U. S. 410, 51 L. Ed. 860.

When the first certificate has been rejected because of form, the questions may be recertified. *Hallowell v. U. S.*, 221 U. S. 317, 55 L. Ed. 750. Even upon argument in the Supreme Court a record fact omitted may be stipulated into the certificate. *Pa. Lumbermens' Co. v. Meyer*, 197 U. S. 407, 49 L. Ed. 810.

Supreme Court Rule 37 relates to certiorari to bring up the whole record in a case where a certificate has been made. See also, *Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488.

Where the certificate from the Circuit Court of Appeals blends statements of fact and of law, or fails to make a distinction between facts which are merely evidential and those which are ultimate, it affords no basis for action by the Supreme Court under Judicial Code, Sec. 239, and the certificate will be dismissed. *Cleveland-Cliffs Co. v. Arctic Iron Co.*, 248 U. S. 178, 63 L. Ed. 198. Likewise, dismissal will be ordered, where the certificate is incomplete in itself and makes reference to the transcript and briefs transmitted with the certificate. *Dillon v. Strathearn Co.*, 248 U. S. 182, 63 L. Ed. 199.

No. 1971.**Order to File, Enter of Record and to Transmit Certificate of Questions to Supreme Court of the United States
(Another Form).**

[*Caption.*]

In the above entitled cause certain questions having arisen on the record, upon which this court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such questions having been prepared and duly signed, it is now here ordered by this court that such certificate be filed and entered of record in this court, and that the original of said certificate be duly certified by the clerk of this court and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

No. 1972.**Certificate of Question of Removal by a Circuit Court of Appeals to the Supreme Court for Instruction.(1)**

[*Caption. in Circuit Court of Appeals.*]

There arises in this case a question of law upon which this court desires the instruction of the Supreme Court for its proper decision.

It is, therefore, ordered, that the statement and question here following be certified to the Supreme Court as provided by Judicial Code, Sec. 239.

The plaintiff, a citizen of the state of Ohio, brought suit in a Common Pleas Court of the state of Ohio, to recover damages for a personal injury sustained by him against the Central Ohio Railroad Company as reorganized, a corporation of the state of Ohio, and against John K. Cowen, and Oscar G. Murrey, as receivers for the Baltimore & Ohio Railroad Company, a corporation of the state of Maryland. The petition averred that the injuries suffered by him were sustained

in consequence of his wrongful and violent ejection from a moving passenger train which he had boarded for the purpose of becoming a passenger thereon. The petition avers that the railroad owned by the defendant, the Central Ohio Railroad Company, has been long under a lease to the Baltimore & Ohio Railroad Company. That said Cowen and Murrey had been appointed receivers of the property of the Baltimore & Ohio Railroad Company and as such placed in possession of same including its leasehold interest in said Central Ohio Railroad Company, under a decree of the United States Circuit Court. The train from which the plaintiff was so ejected was a train operated by the said receivers on the railroad of the said Central Ohio Railroad Company. The joint liability of the said Central Ohio Railroad Company, as reorganized and the said receivers to the plaintiff is based upon section 3305 of the Revised Statutes of Ohio, which provides that "the company to whom any railroad is leased if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in anywise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability; and provided that service may be had upon said companies, or either of them, by the service of process upon any officer or agent of either of said companies."

The *ad damnum* clause of the petition, laid the damage sustained at \$20,000. Upon the petition of the said receivers alone, the said suit was seasonably removed into the District Court of the United States for the proper district. The petition as ground for removal averred that "this cause is a suit

of a civil nature, between Daniel J. Mahoney, as plaintiff, who was at the time of the institution of this suit and still is a citizen of the state of Ohio, residing at — and your petitioners, John K. Cowen and Oscar G. Murrey, as receivers of the Baltimore & Ohio Railroad Company, and The Central Ohio Railroad Company, as reorganized, as defendants, but the defendant herein, The Central Ohio Railroad Company, as reorganized, has no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company; that the said John K. Cowen and Oscar G. Murrey, as such receivers were at the time of the institution of this suit, and still are, citizens of the state of Maryland, residing at Baltimore city, in said state.”

The Central Ohio Railroad Company, as reorganized, did not join in this petition for removal and there was no averment or facts showing any separable controversy wholly between the said receivers and the said plaintiff, but upon the contrary the suit was against the Central Ohio Railroad Company and the receivers as jointly liable for the tort by which the plaintiff had suffered.

The defendant in error entered a motion in the Circuit Court to remove the cause to the Circuit Court for want of jurisdiction, but this motion was never acted upon. There was a jury and verdict and a joint judgment against the said Central Ohio Railroad Company as reorganized and the said Cowen and Murrey, as receivers of the Baltimore & Ohio Railroad Company for \$4,500. Errors were assigned going to the merits of the case but none in respect to the jurisdiction of the court. Upon the argument of the case in this court the plaintiffs in error raised the point that the suit had been improperly removed from the state court and moved this court to reverse the judgment and direct the cause be remanded to the state court as improperly removed.

The court entertaining grave doubt as to the jurisdiction of the District Court certifies to the Supreme Court for its instruction, this question:

"First. Is a suit removable from a state court to a United States court upon the petition of the receivers alone when the action is against receivers appointed by a United States court and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort."

H. L.,
W. D.,
H.S.,

Judges of the United States Circuit Court of Appeals for the ——— Circuit sitting in said case.

(1) Taken from the records in *Central Ohio R. R. Co. vs. Mahoney*, 183 U. S. 694.

No. 1973.

Certificate of Question in a Bankruptcy Proceeding by a Circuit Court of Appeals to the Supreme Court.

[*Caption in the Circuit Court of Appeals.*]

This is an appeal from the District Court for the Western District of Tennessee, sitting as a court of bankruptcy, disallowing a claim filed by the appellants against the bankrupt estate exceeding five hundred dollars in amount. From the transcript of the record it appears:

First. That the Langstaff Hardware Company is a mercantile corporation, organized under the general law of Tennessee, providing for the organization of such corporations, which was engaged in carrying on a general hardware business at Memphis, in the Western District of Tennessee.

Second. Being embarrassed, it, on the 13th day of August, 1900, made a general deed of assignment, under the general assignment law of Tennessee, by which it conveyed to one C. W. Griffith, as assignee, all of its corporate property of every kind, for the equal benefit of all its creditors. The assignee ac-

cepted the trust and qualified by executing bond and taking the oath prescribed by the Tennessee Statute, and entered into possession of all the assigned estate. This deed of assignment provided that the assignee should pay "reasonable counsel and attorney's fees for preparing this deed and for advice and service to be furnished and rendered him in the course of the administration of the trust hereby created." Within four months after this deed of assignment the Langstaff Hardware Company, upon a petition by its creditors, was adjudicated a bankrupt, and this deed set aside as in contravention of the bankrupt law. A trustee was duly chosen, who has taken possession of the assigned assets of the bankrupt.

Third. The appellants filed a claim against the bankrupt estate for professional services rendered the bankrupt in preparing the said deed of general assignment, and the assignee thereunder in advising and counseling him in respect of his duties and in defending a suit brought to wind up the corporation in a State Chancery Court, and for services rendered the assignee in resisting the adjudication of bankruptcy.

The items of this claim were as follows:

- (a) For services rendered the corporation in preparing the general assignment.....\$500 00
- (b) For general advice and counsel to the assignee in respect to the duties of his trust..... 250 00
- (c) For legal services in defense of a suit brought in a state court, wherein it was sought to have the corporation wound up as an insolvent corporation, and its assets distributed under the orders and decrees of the court..... 100 00
- (d) For services rendered by employment of the assignee in resisting an adjudication of bankruptcy against the Langstaff Hardware Company 300 00

The appellants asserted and claimed that each of said items constituted a prior charge upon the assets and asked to have same paid by the trustee in preference to the unsecured credi-

tors. The trustee and certain creditors excepted to each item of this account.

The referee, upon the evidence, found and certified that the services had been rendered as claimed and were reasonably worth the amount claimed, but that the same did not constitute expenses allowable as a preference and were not otherwise a lien. He allowed the item of \$500.00 as an unsecured claim against the bankrupt, but disallowed the other items as not being debts of the bankrupt. His order was duly excepted to and the questions certified to the court in due form. The District Judge sustained the referee so far as he held the claims to be non-preferential and adjudged that none of the items constituted a debt, provable for any purpose against the bankrupt estate. From this judgment the appellants have appealed and assigned error.

Upon this state of facts this court desires the instruction of the Supreme Court, that it may properly decide the questions of law thus arising:

First. Is a claim for professional services rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the making of the assignment, and the assignment set aside as in contravention of the bankrupt law?

Second. Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proven as a preferential claim against the bankrupt estate?

Third. Is a claim against such an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor, allowable as a preferential claim when the necessary effect of the adjudi-

cation would be to set aside the assignment under which the assignee was acting?

Fourth. If not entitled to be allowed as preferential claims, may either of the items described in the foregoing questions be proven as unsecured debts of the bankrupt corporation?

It is, therefore, ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court, at Washington.

H. L.,
W. D.,
H. S.,

Judges of the United States Circuit Court of Appeals for the ——— Circuit sitting in said cause.

(1) Taken from the record in *Randolph v. Scruggs, Trustee, etc.*, 190 U. S. 533.

No. 1974.

**Certificate of Questions of Law Concerning Conflict of Laws,
Application of Fourteenth Amendment, and Enforce-
ability of Contract in Federal Court Denied
in State Court.**

[Caption in Circuit Court of Appeals.]

The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the state of New York for the purpose and with the power of conducting a general building association business in New York and other states. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay \$1 initiation fee for each share of \$100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to \$100, the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise. Prior

to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the Board of Directors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called "the local board" in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's place of residence who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts.

On the second day of January, A. D. 1891, H. L. Bedford, a resident and citizen of Shelby county, Tennessee, made the following application to the association which he delivered to its soliciting agent at Memphis to be forwarded to Syracuse:

| | | | | | | |
|-------|----------|--------|---------------|----------|--------|---------|
| O. K. | | | A. F. 1-26-91 | | | |
| Supt. | Cashier. | Stock. | Recorded. | Indexed. | Filed. | Mailed. |

| | | |
|------------|------------------------|--------------|
| 46 Shares. | Application for Shares | Number 4773. |
|------------|------------------------|--------------|

in the

Eastern Building and Loan Association,
of Syracuse, N. Y.

Agent, J. H. T. Martin.

I, H. L. Bedford, of Bailey, county of Shelby, state of Tennessee, No. of street or P. O. Box —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Association of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that any said attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of January, A. D. 1891.

Signature of Applicant, H. L. Bedford, [*Seal.*]

H. B. Martin, witness.

The price of stock must accompany this application.

Endorsed:

Instructions to Agents.

This application should always be written in ink. All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to:

Name —.

P. O. —.

County —, State —.

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis who, a few days later, handed it to Bedford. The certificate was in the words following:

Series No. B. 2. Maturing August 1st, 1897. Eastern Building and Loan Association of Syracuse, N. Y.

| Certificate Number. | Number of Shares. | Amount. |
|---------------------|-------------------|---------|
| 4773 | 46 | \$4,600 |

This certifies that H. L. Bedford, of Bailey, county of Shelby and state of Tennessee, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the state of New York and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns

the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York, within sixty days after the acceptance and approval of satisfactory proofs. This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be paid, a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installment on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Members may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' stand-

ing and up to two years; the third year's 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shareholders in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any time to make an investigation in all cases prior to the approval of claims.

Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent, bid as premiums on all loans.

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association

shall be commenced within six months after filing proofs, and in the county of Onondaga and state of New York.

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of February, A. D. 1891.

H. H. Loomis, President,

[Seal.]

Jno. J. W. Reynolds,

Secretary and General Manager.

Attached to this were the by-laws of which only the following are deemed material:

Article I.

Sec. 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the state of New York, or in any other state or territory of the United States where no legal prohibition exists, by authority of the Board of Directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

Article IV.

Sec. 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

Article XIX.

Contract of Members.

Sec. 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

Sec. 16. All remittances for advance, installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secre-

tary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

Article XVI.

Local Boards.

Sec. 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may organize a local board or branch of the association. The officers of the local organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

Sec. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

Sec. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from members residing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

Sec. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

Sec. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local board charter shall be issued to such board.

Sec. 6. The president of the local board shall call a meeting thereof whenever three members shall request him so to do.

On the 20th of March, 1891, Bedford made application for

a preference for an advance which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the Board of Directors at Syracuse. Bedford then applied on June 20th for the loan in the letter following:

Application for an Advance.

To the Board of Directors of the Eastern Building and Loan Association of Syracuse, N. Y.:

Gentlemen: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the Board of Directors.

H. L. Bedford,
Applicant.

Witness:

J. H. T. Martin.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage was as follows:

"This grant is intended as security for the payment of the sum of fifty-six hundred, eighty-three and 8-100 dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its

office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent. per annum, payable semi-annually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected and to be erected upon said premises insured against loss or damage by fire in an amount and in such manner and in such company as shall be most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premiums and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments, rates, other charges, adverse claims, claims or encumbrances as

aforesaid, it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, choses or encumbrances and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand, with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or refusal to keep the premises insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns, and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this controversy shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided."

The seventy notes were all of the same tenor, *mutatis mutandis*, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-100 dollars, \$72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1, 1891. H. L. Bedford.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed by the legislature of Tennessee:

Chapter 122.

An act to amend chapter 31 of the acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this state, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this state.

Sec. 1. Be it enacted by the General Assembly of the state of Tennessee, That Chapter 31 of the acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other states or countries for any purpose whatsoever which may desire to do any kind of business in this state.

Sec. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this state, for any purpose whatever, desiring to own property or carry on business in this state of any kind or character, shall first file in the office of the secretary of the state, a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of acts of 1887.

Sec. 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this state without having first complied with the provisions of this act, and a vio-

lation of this statute shall subject the offender to a fine of not less than \$100 nor more than \$500, at the discretion of the jury trying the case.

Sec. 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state just as though it were created under the laws of this state.

Sec. 5. Be it further enacted, That when such corporation has no agent in this state upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

Sec. 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

Sec. 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

Thomas R. Myers,
Speaker of the House of Representatives.

W. C. Dismukes,
Speaker of the Senate.

Approved March 26, 1891.

John P. Buchanan, Governor.

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows: (Chapter 2 of the Acts of 1891.)

Sec. 3. Be it further enacted, That no building and loan association organized under the laws of any other state, territory or foreign government, shall do business in this state unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some state officer of this or some other state of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand (\$25,000) dollars nor more than fifty thousand (\$50,000) dollars, at the discretion of the state treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the state, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein may from time to time, be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any state, territory or foreign government shall, before commencing to do business in this state,

First. File with the treasurer of this state a duly authenticated copy of its charter or articles of incorporation.

Second. File with the treasurer of this state the certificate of the proper state officer of another state or the president and treasurer of some responsible trust company certifying that it has on deposit securities, not less than \$25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the state treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing, that if any legal process affecting such association be served on said state treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this state.

Fourth. Pay the state treasurer twenty-five (\$25) dollars as fees for filing the papers mentioned in this section.

Sec. 7. Be it further enacted: No officer, director or agent of any foreign building and loan association shall, in this state, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this state any stock of an association while said association has not on deposit securities as required by section 3 of this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the first of January and said treasurer is authorized to collect from each agent for said license \$2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars.

The association filed its charter with the secretary of the state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan stock already subscribed for, after that date.

The Supreme Court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made

payable in Minnesota are Minnesota contracts, but that they are, nevertheless, void in Tennessee and can not be enforced in the courts of Tennessee. *United States Savings & Loan Company vs. Miller*, 47 Southwestern Rep. 17, affirmed on appeal by Supreme Court, December 18, 1897, without written opinion.

Bedford defaulted in his payments on the notes and the association filed a bill in equity in the Circuit Court of the United States for the Western District of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant, Bedford, answered averring that the notes and mortgage were in violation of the above quoted laws of Tennessee and were void and could not be enforced.

This court, being in doubt upon the questions thus raised, hereby certifies to the Supreme Court the following questions and respectfully requests answer to the same.

First question: Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

Second question: Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which it was incident, or by the law of the state where the land lay which the mortgage conveyed, and which upon default must be sold to pay the notes?

Third question: May a state by its laws forbidding the transaction of business within its borders annul the contracts of its citizens entered into and to be performed without the state, when those contracts are but the consummation of the inhibited business within the state, without an infraction of the 14th amendment to the Constitution of the United States?

Fourth question: Even if a state may by law refuse enforcement of such a contract in its courts, should a Circuit

Court of the United States sitting in the state refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?

H. L.,

W. D.,

H. S.,

Judges of the United States Circuit Court of Appeals for the ——— Circuit sitting in said case.

(1) Taken from the record in *Bedford v. Eastern Building & Loan Assn.*, 181 U. S. 227.

No. 1975.

Order Certifying Questions to the Supreme Court of the United States, Involving Conflict of Laws, Application of Admiralty or State Statutory Rules and Validity of State Statute.

[Caption.]

PER CURIAM :

We have decided to certify to the Supreme Court three questions, any one of which may be controlling; but as two of the questions were not argued, and for the purpose of making clearer the difficulties involved, we accompany our statement of facts with some explanation and discussion.

The Zenith Steamship Company was a Minnesota corporation, and was the owner of the steamer "Saxona," which was registered at the port of Duluth, and was engaged in freight carrying on the Great Lakes. Schwede signed shipping articles at Duluth, whereby he became a wheelsman on the boat. While such employment was continued and while the steamer was moored at a dock in the harbor at Cleveland, Ohio, the first mate ordered Schwede to climb up a wire cable leading to the top of the foremast. The mate knew that this was dangerous work and that Schwede was so temporarily exhausted from other work just finished that it was unsafe for Schwede, without rest to obey this order; yet, it was insisted upon, and while complying, Schwede.

because of his exhaustion, fell and was badly injured. To recover the pecuniary consequential damages, he brought against the Zenith Company an action of negligence in a common law Ohio court, at Cleveland. The defendant therein removed the suit, on the ground of diversity of citizenship to the United States District Court for the Northern District of Ohio. The pleadings were so shaped as to make clear that plaintiff claimed liability upon the common-law principles of negligence, and that he sought to escape the effect of the common law or maritime rule that the mate was a fellow servant, by relying upon the so-called Norris Act, a law of the state of Ohio, the relevant parts of which are copied in the margin, and which provides that a servant with supervisory powers shall not be considered as a fellow servant of the subordinate who is injured, but shall be deemed a vice-principal. The defendant insisted that it was not liable—and this, because the injury occurred on the navigable waters of the United States, and was governed by the maritime law regulating the relations between seamen and their vessel, and such liability could not be enlarged by a law of the state of Ohio. The District Court sustained the defendant's contention (216 Fed. 566), and plaintiff brought error to this court.

Upon these facts (which appear by demurrer), the first inquiry is whether the Norris Act, however general its language, was really intended to reach and cover injuries happening within the territorial limits of Ohio but to seamen on board foreign or interstate ships temporarily within such limits. It seems that, in the maritime law, there is no liability whatever against a vessel or its owners resulting in favor of a seaman from negligence in the operation of the boat or in the giving of directions by its officers. Lack of seaworthiness in a vessel or fittings will support an action. but the whole subject of negligence as existing on land between master and servant is unknown on board ship, and so the rules as to fellow servants, assumption of risk and

contributory negligence as a bar, are equally foreign to this code of law (*City of Norwalk*, D. C., 55 Fed. 98; *The Osceola*, 189 U. S. 158). Neither the Norris Act nor the sections of the General Code which it amended created a liability in favor of the servant against the master for negligence. Its several sections refer to actions brought based upon the then existing municipal law or common law of negligence, and assume to modify and change that existing code by defining "fellow servant," by provisions regarding evidence, by abolishing the fellow servant defense and the defense of assumption of risk in certain cases, and providing that, in some cases, contributory negligence shall not be a bar but shall only affect the amount of the recovery, and that certain contracts of exemption shall be void. On one hand, it may be argued that these provisions are not suitable for a complete code upon the subject as between vessel and seaman, and that they are so inappropriate to the existing maritime law as to indicate that they are not intended to be incorporated therein. On the other hand, the language used is general and is, on its face, broad enough; many Ohio residents are engaged in this general kind of labor; and the lack of remedy by the maritime law might be an additional reason for providing remedy by statute. It is true several sections refer to "boats" in the list of places or conditions named, but this reference may be thought to be fully enough satisfied by boats out of commission or by nonmaritime labor in connection with boats in commission. We think it proper to ask the opinion of the Supreme Court whether the statute shall be taken as intended to reach such negligence and such injury as this record shows.

If it be thought that the language of the Ohio statute should be taken as reaching the case, and that the rules of the maritime law in this respect may be changed by legislation, the question is, "By what state law is this liability of a ship to be determined? By the law of the state where the injury occurs, or by the law of the home port—in this case,

by Ohio or Minnesota?" This is important because, in Minnesota, at the date of this injury, the common law rule prevailed, the mate would have been considered a fellow servant, and there could have been no recovery. A Minnesota statute, in part resembling the Norris Act, was passed in 1895 (Chap. 173, G. L. of 1895), but this was repealed in 1905 (Sec. 5541, R. L. of 1905), and there was no further legislation of this character until the Workmen's Compensation Act of 1913 (Chap. 467, G. L. of 1913).

Upon full consideration, this court held, in *McGregor v. Thompson Towing & Wrecking Association*, 207 Fed. 209, that where a negligent injury was suffered by a seaman on board a Michigan boat while that boat was in Canadian waters, the liability was governed by the Michigan statute and not by the Canadian. We see no clear reason for distinguishing between a Michigan boat in Canadian waters and a Minnesota boat in Ohio waters; and yet, the difference between the relations of a state and a foreign government and of one state to another may furnish a distinction; and we think there has been a very common understanding that the statute of the state within which the injury occurred would control. The analogy of an interstate train, which, lacking federal statute, would be subject, in this respect, to the laws of each state through which it passed, is far from perfect, since, with reference to the train, the local jurisdiction is exclusive, while the state has incomplete jurisdiction over public waters. Further, the practical difference in the application of the rule is great. State boundaries on land are fixed and known; but a boat, sailing from Duluth to Buffalo, or from Minneapolis to New Orleans, crosses state lines repeatedly, and, in the latter case almost continually, and often no one could afterwards tell within what state a particular event happened. We hesitate to apply the rule of the *Thompson* case; and conclude that the opinion of the Supreme Court is a prerequisite to a satisfactory decision.

The question decided below and here argued assumes that the Ohio law intended to control all boats in Ohio harbors, and that Ohio is the state to which we must look for a statutory rule, but concerns itself with the power of the Ohio legislature to make a law with this effect. It seems to be settled that the maritime law is a distinct code, exclusively within federal control and not subject to change by any state (*The Lotowanna*, 21 Wall. 558; *The City of Norwalk*, *supra*). This extends to attempted changes in maritime law by state statute (*Butler v. Boston*, U. S. C., 130 U. S. 527), or by applying a state municipal law (*Workman v. New York*, 179 U. S. 552). It is suggested that the disability extends only to admiralty remedies given in the admiralty court, and not to such changes in the substantive rule as can be enforced by a common law action in a state or Federal court; but we can not think that the disability of a state stands on such formal ground. The rights of the parties, seamen and owners, are the important things, and it is not lightly to be presumed that two courts, held perhaps by the same judge on the same day, would administer essentially inconsistent rules of liability. This is emphasized by the fact that every common law action against boat or owners can be transferred into the admiralty court, at the option of the owners, through a petition for limitation of liability. We are impressed that the true ground on which such state laws have been held inoperative, is that the subject matter is withdrawn from the field of state legislation (*Mack S. S. Co. v. Thompson*,—C. C. A. 6—176 Fed. 499). If the state can not give a lien on a foreign vessel for a nonmaritime contract because the subject is one regulated by that code of maritime law which exclusively possesses the field (*The Roanoke*, 189 U. S. 185), it is difficult to see how the state can have power to make laws modifying the existing code of liability as between vessel and seamen. The field of that subject is as fully occupied by the existing operation of the maritime law as is the field of liens.

On the other hand, it was held in this and other circuits, and, eventually, by the Supreme Court (*The Hamilton*, 207 U. S. 398), that a statute creating a liability for death by wrongful act extended to the case of a collision on the high seas. It is urged that the death cases are not as persuasive one way as the lien cases are the other, because it is said that upon the subject of death, there was no admiralty law, while upon the subject of liens (as well as the subject of a seaman's right to compensation for his injuries) there was an existing body of maritime law; but this distinction is not satisfactory. When it was decided in *The Harrisburg*, 119 U. S. 191, that the admiralty law recognized no death claim, that doctrine became part of the maritime law as much as if the answer had been in the affirmative.

The Hamilton has been treated by counsel as holding that there would have been a liability in this case, if Schwede had been killed. It may be that the opinion in *The Hamilton* intended carefully to reserve the question whether the state statute would have been effective to give a claim growing out of the death of one of the seamen of the negligent boat (see comment at foot of p. 406); but as between what seem to be the general doctrines of *The Roanoke* and *The Hamilton*, we find such difficulty in determining the proper rule for application here as to justify certifying.

Accordingly, and based upon the facts recited at the beginning of this memorandum, the questions of law concerning which this court desires the instruction of the Supreme Court are as follows:

1. Should the Ohio statute be considered intended to cover Schwede's injury?
2. If liability for Schwede's injury is controlled by the law of any state, is it by the law of Ohio or by the law of Minnesota?
3. If the law of Ohio rather than Minnesota is applicable, and if the Ohio statute was intended to reach such an injury, is the statute to that extent valid?(1)

(1) *Schwede v. Zenith Steamship Co.*, 244 U. S. 646.

No. 1976.**Certificate from the United States Circuit Court of Appeals
to the Supreme Court, Involving Constitutionality of
Suffrage Amendment to a State Constitution—
the "Grandfather Clause."(1)**

[*Caption.*]

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, on the sixteenth day of December, A. D. 1912, certifies that the record in the case above entitled which is pending in this court upon a writ of error to review a judgment of conviction of Frank Guinn and J. J. Beal of the offense of wilfully and corruptly conspiring to injure, oppress, and intimidate, on account of their race and color, certain negro citizens named in the indictment, who were electors qualified to vote for a member of Congress in the congressional district and in the precinct in Oklahoma in which they resided, in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States to vote for a qualified candidate for such member of Congress at the general election on November 8, 1910, in violation of Sec. 5508 of the Revised Statutes, now Sec. 19 of the Penal Code, discloses these facts:

The defendants below were duly indicted for the offense of which they were convicted; they were arraigned; they pleaded not guilty; they were tried by a jury which found a verdict against them; they were convicted and they were sentenced to serve one year in the penitentiary at Leavenworth, Kansas, and each to pay a fine of one hundred dollars, and they have sued out a writ of error to this court to review the judgment against them. The indictment charged that the defendants below wilfully and corruptly conspired together to injure, oppress, and intimidate, on account of their race and color, certain negro citizens named in the indictment who were qualified to vote for a qualified candidate for a member of Congress in the congressional district

and in the precinct in which they resided, in the full exercise and enjoyment of the right and privilege secured to each of them by the Constitution and laws of the United States to vote for a qualified person for a member of Congress at a general election on November 8, 1910, and to prevent them from exercising that right and privilege, and from voting for a member of Congress, and that in pursuance of said conspiracy and to effect its object the defendants below, who were members of the election board of the precinct in which the negro citizens were entitled to vote, did, by illegal oppression, intimidation, and threats deny and prevent the exercise by these negro citizens of their right to vote for a qualified candidate for a member of Congress at the election named, although the negro citizens repeatedly demanded and sought to exercise that right and privilege at the time and place of the election in their precinct. At the trial of the case there was substantial evidence that the defendants were members of the election board of the precinct in which the negro citizens named in the indictment resided, and that the defendants wilfully and corruptly conspired together to injure, oppress, and intimidate some of these negro citizens named in the indictment as therein charged, and that in pursuance of that conspiracy they so oppressed and intimidated them in the free exercise of their right and privilege of voting for a qualified candidate for a member of Congress that they prevented them from exercising, deprived them of, and denied them that right and privilege.

The original Constitution of the state of Oklahoma provided, with certain exceptions not material in this case, that "the qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days next preceding the election at which any such elector offers to vote." (Constitution of Oklahoma,

Art. III, Sec. 1.) There was undisputed testimony at the trial that the negro citizens named in the indictment were qualified electors entitled to vote for a qualified candidate for a member of Congress under that Constitution. But in 1910, prior to the eighth day of November in that year, the day of the general election, this amendment to that Constitution was adopted: "No person shall be registered as an elector of this state, or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the state of Oklahoma. And no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote." There was substantial testimony at the trial that several of the negro citizens named in the indictment were not, and that their lineal ancestors were not, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, and that each of them, or each of his lineal ancestors, at that time resided in the United States and was a slave; that the defendants claimed that by reason of this amendment these negro citizens were deprived of their right to vote for a qualified candidate for a member of Congress unless they were able to read and write and unless they did read and write, in the presence of the defendants, any such section of the Constitution of Oklahoma which the defendants selected. That, on the other hand, the negro citizens claimed at the election, and the United States insisted at the trial, that the amendment was

unconstitutional and void, and that the negro citizens who, the evidence introduced at the trial proved, were in all other respects qualified to vote for a qualified candidate for a member of Congress, were qualified so to vote, although they were not able to read or write, and did not read or write any section of the Constitution of Oklahoma.

The trial court, speaking of the negro citizens named in the indictment, charged the jury, among other things, in these words: "As the evidence on the point is undisputed, I take it you will have no difficulty in concluding that a number, or several, of these colored voters (referring to the negro citizens named in the indictment) were entitled to vote for congressional candidates in Union Township precinct (the precinct in which they resided) and were deprived of such right. * * * The fourteenth amendment declares them to be citizens if they were born in the United States and subject to the jurisdiction thereof. If they were citizens, and otherwise qualified to vote, they had a right the same as all citizens to be not discriminated against on account of their race or color. This right is guaranteed by the fifteenth amendment to the Federal Constitution, which provided that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States on account of race, color, or previous condition of servitude.' And Congress has also provided, by Sec. 2004, Revised Statutes, 'All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any state, territory, district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding.' * * * In the opinion of the court, the state amendment which imposes the test of reading and writing any section of the state Constitution as a condition to voting to persons not on or prior to

January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it insofar as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and co-operated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting and they can not be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them, entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they can not be shielded by their official positions.”

The evidence at the trial, and the charge of the court which have been referred to in this certificate, together with the exceptions to the rulings herein mentioned, were embodied in a bill of exceptions duly settled by the court, a copy of which forms a part of the transcript of the record before this court.

The fourteenth assignment of error made by the plaintiffs in error is, “The court erred in instructing the jury as follows: ‘In the opinion of the court the state amendment, which imposes the test of reading and writing any section in the Constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or as a resident of some foreign nation, or a lineal descendant of some such person, is not valid,’ and an exception to this portion of the charge of the court was duly made and preserved at the time it was given.”

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to it in the case above entitled, that a decision of each of these questions is indispensable to a determination of the cause, and that to the end that the cause may be properly determined and disposed of, it desires the instruction of the Supreme Court of the United States upon these questions:

1. Was the amendment to the Constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma, unless they were able to read and write any section of the Constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that state, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?

WALTER H. SANBORN,

WALTER I. SMITH,

Circuit Judges.

CHARLES A. WILLARD,

District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH
CIRCUIT.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Frank Guinn and J. J. Beal, plaintiffs in error, v. United States of America, No. 3736, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, this sixteenth day of December, A. D. 1912.

[Seal.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

(1) Taken from the record in *Guinn & Beal v. U. S.*, 238 U. S. 347.

No. 1977.

**Certificate of Clerk of a United States Circuit Court of Appeals
to a Certificate of Questions to the Supreme Court.**

United States Circuit Court of Appeals for the — Circuit.

United States of America, }
— Judicial Circuit, } ss:

I, W. R., clerk of the United States Circuit Court of Appeals for the — Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of A. B. v. C. D. was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of —, this — day of —, A. D. —.

[Seal.]

W. R.,
Clerk of the United States Circuit Court
of Appeals for the — Circuit.

**PETITIONS TO REVIEW ORDERS IN BANKRUPTCY IN
A CIRCUIT COURT OF APPEALS.**

No. 1978.

Notice of Filing Petition for Review (1).

United States Circuit Court of Appeals
For the ——— Circuit.

In re Petition of A. B., } In Bankruptcy.
For Review.

To R. Y., attorney for the C. D. Trust Company, trustee
in bankruptcy for G. H.:

You are hereby notified that on the ——— day of ———, at
12 o'clock m., I will file in the clerk's office of the United
States Circuit Court of Appeals for the ——— Circuit, in the
city of ———, a petition for review in the above entitled cause,
a copy of which petition is hereto attached as a part of this
notice, and I will then ask to have the case docketed and the
necessary order made therein to have such case set down for
hearing.

R. X.,

Attorney for Petitioner.

I hereby accept service of the above notice this ——— day
of ———.

R. Y.,

Attorney for C. D. Trust Co., Trustee in Bankruptcy
of the said Bankrupt's Estate.

(1) Some notice should be given the parties in the bankruptcy court
who are interested in the appeal either by form of citation or notice.
The petition is sometimes filed in the Court of Appeals and when
docketed and printed, a copy of the printed petition and exhibits are
served upon opposing counsel. The better practice, however, is to give
notice in substantially the form above given.

No. 1979.**Petition to a Circuit Court of Appeals to Review an Order in
Bankruptcy (1).**

The United States Circuit Court of Appeals

For the — Circuit.

In the Matter of A. B. and C. B., }
Petitioners. } Petition for Review.

To the Honorable Judges of the United States Circuit Court
of Appeals for the — Circuit.

The petition of A. B. and C. B. respectfully shows unto the
court:

First. That on the — day of —, A. D. —, they presented the petition unto the Honorable G. S., judge of the District Court of the United States for the — District of —, a true copy of which petition is hereto attached and marked "Exhibit A."

Second. On the — day of —, A. D. —, the said A. H., trustee in bankruptcy, and G. F., administrator of the estate of E. F., deceased, by their counsel, filed a plea and demurrer to said petition, a true copy of each of which is hereto attached and marked "Exhibit B. and C." No other persons appeared in opposition thereto.

Third. On the — day of —, A. D. —, the Honorable G. S. entered an order duly dismissing said petition with costs and sustaining said demurrer; said matter having been fully argued before said court.

Fourth. Your petitioners charge the fact to be that the said District Court erred in dismissing said petition and in sustaining said demurrer; and your petitioners are aggrieved thereby and therefore pray this honorable court to review and revise the decision of said court below.

Fifth. No proof was taken in connection with the determination by the Honorable G. S. and the entire proceedings

upon which said dismissal was grounded appear in the exhibits hereto attached.

Sixth. Your petitioners further show that no opinion was filed by said court in the matter.

Seventh. Your petitioners therefore pray that such order of the District Court be set aside and held for naught and that by the order of this court it be decreed that your petitioners have a right to have an issue framed and the truth of the averments contained in their said petition determined according to the rules and procedure applicable in such cases, and that your petitioners be given such other relief as shall be proper.

That an order be entered directing the manner and time of service of this petition.

A. B.,

C. B.,

R. X., Attorney for Petitioners.

A. B., one of the petitioners mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

A. B.

Sworn and subscribed to before me this — day of —,
A. D. —.

J. N.,

Notary Public, — County, —.

(1) Congress has provided two means of review by a Circuit Court of Appeals of orders and judgments of a court of bankruptcy. Sec. 25 of the Bankruptcy Act of 1898 provides for appeals in three classes of cases. Par. 24b of the same act provides for superintending and revising in matters of law only. An appeal is taken in the usual form, and the Court of Appeals may review both matters of fact and law on such proceedings. But on a petition to review an order of a court of bankruptcy the Circuit Courts of Appeals are confined to questions of law. This distinction has been clearly made in the opinions. See *Mueller vs. Nugent*, 184 U. S. 1; *Cunningham vs. German Ins. Bank*, 101 Fed. Rep. 977, 4 Am. B. R. 192; *Courier-Journal Job Print. Co. vs. Schaeffer-Meyer Brewing Co.*, 101 Fed. Rep. 699, 4 Am. B. R. 183; *in re Rouse, Hazard & Co.*, 33 C. C. A. 356, 91 Fed. Rep. 96; *in re Richards*, 37 C. C. A. 634, 96 Fed. Rep. 935; *in re Abraham*, 35 C. C. A. 592, 93 Fed. Rep. 767; *in re Purvine*, 37 C. C. A. 446, 96 Fed. Rep. 192. See also *Loveland on Bankruptcy*, sec. 312.

This petition should be filed in the United States Circuit Court of Appeals. In *re Williams*, 105 Fed. 906; *Courier-Journal Job Print Co. v. Schaeffer-Meyer Brew. Co.*, 101 Fed. 699, 4 Am. B. R. 183. As to the form of petition and proceedings on petition to review and revise matters of law in a Circuit Court of Appeals, consult *Loveland on Bankruptcy*, Sec. 313; General Orders 36.

No answer or reply need be filed to a petition for review in a United States Circuit Court of Appeals. A question of law is presented to the court substantially as on a writ of error.

The record must contain sufficient matter upon which the court may review and revise a question of law and no other. See *Cunningham v. German Ins. Bank*, 103 Fed. 932.

Collier on Bankruptcy, 11th ed., 1917, at p. 574, presents an outline of the methods of appeal in bankruptcy. Copious footnotes cite cases supporting the outline.

As to the Time of Taking Appeals. Bankruptcy Act, Sec. 24a, provides for appeals in controversies arising in bankruptcy proceedings, and in such cases the time of appeal is determined by the rule with reference to other cases in equity. See *Globe Co. v. Martin*, 236 U. S. 288, 59 L. Ed. 583.

Where the appeal is in a bankruptcy proceeding, Sec. 25a provides that it must be taken within ten days after the judgment is rendered.

The time within which a petition for review should be filed is not specified in the statutes or the general orders. Rule 38 of the C. C. A. 2nd Cir., specifies that the petition to review under Bankruptcy Act, Sec. 24b, must be filed and served within ten days after the entry of the order. But the judge may for good reason enlarge the time. In the other circuits the matter does not receive specific mention. The time to file the petition on appeal, however, is fixed at ten days in Sec. 25 of the Bankruptcy Act. The practitioner should consult the rules of the circuit in question.

The Supreme Court no longer has jurisdiction in error or appeal in bankruptcy matters as provided by Secs. 24 and 25 of the Bank-

ruptcy Act. Jurisdiction in the Supreme Court now rests entirely in certiorari as provided by Act of January 28, 1915, 38 Stat. L. 804, re-enacted in Act of September 6, 1916, 39 Stat. L. 727. The jurisdiction to entertain a certificate of questions of law from the Circuit Court of Appeals is not abrogated.

No. 1980.

**Petition in a Circuit Court of Appeals to Review an Order in
Bankruptcy Disallowing Labor Claims.**

The United States Circuit Court of Appeals
For the ——— Circuit.

In re A. B. & Company et al., Petitioners.

And now comes E. F., for himself and eighty-eight other labor claimants, whose names, as well as the amounts due them, respectively, for labor performed by them for said A. B. & Company within three months next after the appointment of the receiver, August 27, 1888, appear in the agreed statement of facts attached to this petition and marked "Exhibit A," and, complaining of the orders and judgment heretofore rendered against these complainants by the Hon. A. J., judge of the District Court of the United States for the ——— District of ———, says:

On the 22nd day of October, A. D. 1900, this cause came on to be heard before said judge, to review the proceedings and final order of A. M., Esq., one of the referees in bankruptcy

within and for said district, which said proceedings and final order was based upon said agreed statement of facts.

All creditors and all persons in interest having consented to said agreement, and to this proceeding, and having so consented after the expiration of the time limited for other persons to come into the case, it is conceded that all are bound by the order of this court under the provisions of said stipulation.

Your petitioners contended in the court below, as they now contend in this court:

First. That upon the facts set forth in said agreed statement of facts which is attached hereto, marked "Exhibit A," and made a part of this petition, said funds passed into the hands of the said trustee charged by force of the laws of — with an equitable lien in favor of said claimants, and each of them, as set forth in schedule B, attached to said statement of facts, and that said claimants were and are entitled to be first paid from said funds after the payment of taxes and costs of administration.

Second. That in said proceeding of the Common Pleas Court, that court acquired full and complete jurisdiction for the purpose of determining the respective rights of the parties to that suit. That the parties and subject matter were all before that court, and that no other court had jurisdiction, nor could they acquire jurisdiction to adjudicate and determine the issues there involved.

That no proceedings were ever instituted in the court of bankruptcy to stay that proceeding, and that that court had, therefore, complete jurisdiction to proceed as it did proceed to final decree, and that before the adjudication in bankruptcy.

The petitioners, therefore, contended, as they now contend, that that fund was in the custody of that court, which was proceeding to administer upon it, and that by reason of the

ruling and judgment herein complained of, they have been aggrieved and damaged to the full extent of the several amounts due them as aforesaid.

This cause thus being submitted to the court on questions of law arising upon the facts so as aforesaid agreed upon by all the parties having an interest in the estate of said bankrupt, or either of them, the court decided and held, as matter of law.

First. That section 3206a of the Revised Statutes of — created no lien in favor of said labor claimants upon the funds in the hands of the receiver in the state courts, or in the hands of the trustee in bankruptcy for distribution.

Second. That section 64b of the Bankrupt Act does not fix or prescribe any lien in favor of the wages due these claimants.

Third. That under the facts set forth under the agreed statement of facts, said labor claimants have no interest in said funds other than as common creditors.

The court declined to pass upon and construe the effect and validity of the decree of the Court of Common Pleas of — county, —, in favor of said labor claimants January 13th, 1899.

The court thereupon ordered, adjudged and decreed that the orders of said referee heretofore made in this case upon the same issues, and based upon the same facts in respect to these labor claims, be affirmed, and that the petition of these claimants on their behalf be, and the same was dismissed. A copy of said order, marked "B," is attached hereto.

To all of which ruling of law and judgment of the court these labor claimants at the time excepted and still do except, and they now pray this honorable court to review said rulings, orders and judgments of the honorable District Court herein complained of, order the payment of said labor claims as set forth in said schedule "A," attached to said agreed statement

of facts from the funds now in the hands of the trustee, H. S., and for such other relief as they may be found entitled to.

Y. & Y.

Attorneys for all the within named labor claimants and Petitioner E. F.

United States of America, State of —, County of —, ss.
District aforesaid.

E. F., being the petitioner above named, for himself and others, does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

E. F.

Sworn to and subscribed by E. F., before me, this — day of —, A. D. —.

W. E.,

Notary Public,

— County.

(1) Taken from the record *in re* Laird, 109 Fed. Rep. 550, 48 C. C. A. 538.

No. 1981.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy to Compel Assignee to Pay over Moneys to Trustee.

United States Circuit Court of Appeals, Sixth Circuit.

Leonard Comingor, }
Petitioner. } In Bankruptcy.

The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the District Court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bank-

ruptcy and praying a subpoena against the alleged bankrupts and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same tender and answer, although nothing was alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer. He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the District Court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the District Court to allow the tendered answer of Simonson, Whiteson and Company to be filed and directing a trial on issue made. In accordance thereto said District Court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge Simonson, Whiteson and Company bankrupts, who again appealed, September 22nd, 1899. All of the matters herein so far referred to appear in Records Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said District Court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one,

directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the state court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of \$92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers, appointed by the state court; that he had disturbed for expenses in carrying on the business and converting assets into cash the sum of \$19,876.73; that he drew as his commissions \$3,398.90, and paid his counsel for necessary services \$3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof, marked Exhibit No. 2.

Whereupon on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson Circuit Court, Common Pleas Division, for an order directing the state court receiver to pay over to the receiver herein the entire fund in said state court in the action of L. Comingor, assignee, etc., vs. Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said state court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of \$6,766.53, not then paid into the state court by Comingor, assignee, for creditors and still in his hands. A

copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said Trust Company, receiver herein, appeared before said state Circuit Court and asked leave to withdraw the entire fund in court, \$46,305.03, all of which was submitted to said Circuit Court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the state court June 21st, 1900, and a copy of an injunction of the District Court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any state court and especially in action No. 19,944, entitled L. Comingor, etc., vs. Simonson, Whiteson, etc., pending in the Jefferson Circuit Court." A certified copy of said injunction and said notice are hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the state court took under advisement.

At the same time that the receiver in bankruptcy was applying to the state court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, *sua sponte*, ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded on June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz.: June 28th, 1900, said

referee, without notice or appearance of any one and *sua sponte* entered another show cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of \$3,000.00, "recited in his report," as having been paid to his counsel and the further sum of \$200.00, as shown in said report to have been paid to others counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the state court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson Circuit Court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the state Circuit Court the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the state Circuit Court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order, are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in

bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response, whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the state court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtain the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the District Court herein as already shown, preventing any action on his part in said state court, and at the same time was being pressed by said show cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the state court suit was pending and he was within that jurisdiction making his settlement. He, therefore, filed his petition for review by the District Court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said District Court, of which a copy is filed as part hereof, marked Exhibit No. 15. On the 7th day of July, 1900, said petition for review came on for hearing before the District Court, was heard, and the District Court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact

and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon the referee immediately commenced taking evidence and continued to take from time to time, during which, viz.: on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the District Court has any jurisdiction of the petitioner or of the subject matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the District Court on December 11, 1900, in which report he declines to modify his former rulings and report and recommends the dismissal of petitioner's appeal to the District Court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the District Court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 18th day of January, 1901, the District Court filed an opinion, of which a copy is filed as part hereof, marked Exhibit No. 20, sustaining the referee and dismissing the petition for reviewing and directing proper orders to be entered to that end, which orders were entered on the 26th day of January, 1901, and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States, Saturday, January 26th, 1901.

| | | |
|---|---|----------------|
| In the matter of Sinsheimer, Levinson & Co., etc., vs. Simon, Whiteson & Co., D. G. Simon- son, I. Whiteson & Leon Stern. | } | In Bankruptcy. |
|---|---|----------------|

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sum of \$3,398.90 and \$3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sum of \$3,398.90 and \$3,000.00 on or before February 16th, 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said District Court and injured thereby and that the errors complained of consist:

First. In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

Second. In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

Third. In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

Fourth. In said court holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in said summary manner had.

Fifth. In said court holding that it had the power and juris-

diction herein to grant or issue the injunction against Leonard Comingor.

Sixth. In said court holding that said referee had the power or jurisdiction to issue said show cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

Seventh. In said court holding that the filing of said responses of Leonard Comingor gave said referee or court jurisdiction or power to proceed thereon in any manner in said matter, or in the manner had.

Eighth. In said referee and said court adjudging said responses and each of them insufficient.

Ninth. In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupts' estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

Tenth. In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

Eleventh. In the court's adjudging that said Leonard Comingor was properly before the court in said proceedings.

Twelfth. In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

Thirteenth. In the court's finding as a fact and adjudging that said Leonard Comingor was a party to this proceeding in bankruptcy.

Fourteenth. In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the state court proceeding which was done, and the receiver and trustee became a party to said suit in

the state court and withdrew all the money paid into the state court by said Leonard Comingor.

Fifteenth. In the court holding that the proceedings herein against petitioner Comingor are equivalent to a plenary proceeding against him.

Sixteenth. In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the District Court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the District Court be reviewed and revised in the matters of law and that it be adjudged that said District Court was without jurisdiction, and if that can not be done, then adjudge that the summary proceedings herein were illegal and void or if that can not be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the District Court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays further for all other necessary and proper relief herein.

R. X.,

Attorney for Petitioner.

State of Kentucky, County of Jefferson, ss.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

Leonard Comingor.

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904.

D. A. Sachs,

Notary Public in and for Jefferson
County, Kentucky.

No. 1982.**Petition to a Circuit Court of Appeals to Review an Order in
Bankruptcy Marshalling Liens.**

United States Circuit Court of Appeals

For the ——— Circuit.

In the matter of

E. F., S. H., & J. K.,

vs.

The A. B. Company, Bankrupt.

} In Bankruptcy.

Petition of First National Bank of ——— for Review.

The petition of the First National Bank of ———, a creditor of the A. B. Company, bankrupt herein, respectfully shows to this court that on the 3rd day of April, 1899, a creditor's petition was filed against the said A. B. Company, which is a corporation, in the District Court of the United States for the district of ———, and that on the 21st day of April, 1899, the said A. B. Company was duly adjudged a bankrupt, and that on said 21st day of April the District Court of ——— referred said estate to A. M., referee for said court, and that one of the purposes of said reference was for said referee to receive claim against said bankrupt's estate, allow or disallow same, and to pass upon secured and preferred claims.

Your petitioner shows that on the 7th day of June, 1899, it filed its duly verified proof of claim with said referee, setting up a claim against said bankrupt's estate for seventeen hundred (\$1,700.00) dollars, said claim consisting of a note for a like amount, signed by said bankrupt and A. B., and also claiming and asserting a lien upon certain property of said bankrupt under and by virtue of a mortgage executed by said bankrupt to said A. B., J. F. and N. G., mortgagees, to secure them or any of them from loss by reason of their being liable as sureties for debts of said bankrupt or becoming liable therefor within a period of four years thereafter. The property conveyed by said mortgage is as follows:

"Lying and being in ——— county, of ———, and more particularly described as follows, to wit:

[Here describe the property mortgaged.]

Said mortgage was dated April 15th, 1892, was duly acknowledged and recorded October 12th, 1892, and the limit of indemnity afforded the mortgagees thereby was twenty-five thousand (\$25,000.00) dollars. A copy of said mortgage was filed with said proof of claim, and a copy thereof is filed herewith as a part hereof marked "Exhibit A."

Your petitioner further shows that its said debt was originally created April 10th, 1895, within the four years' limit set out in said mortgage, and it claimed and now claims to be substituted and subrogated to the rights of said mortgagee, A. B., under said mortgage and that its said debt was protected thereby and entitled to share in the indemnity thereof. Your petitioner also showed and shows that its said debt was originally for the sum of three thousand (\$3,000) dollars, and had been reduced from time to time by partial payments thereon down to seventeen hundred (\$1,700) dollars, and that this sum was due and unpaid, and is now due and unpaid, and the lien had not and has not been waived, released nor in any wise relinquished.

Your petitioner further shows that on the 18th day of November, 1889, said referee passed upon its said claim, and allowed it only as a general or unsecured claim against said bankrupt's estate, and refused to allow the same as secured or entitled to any lien under said mortgage dated April 15th, 1892, or the rights of the said mortgagee, A. B., therein. A copy of the order of said referee upon the claim is filed herewith as a part hereof, marked "Exhibit B."

Your petitioner shows that thereafter on the 24th day of November, 1899, it filed its petition for review with said referee, setting out the error complained of, and that the referee forthwith certify to the judge of the District Court the question presented, a summary of the evidence relative thereto and the finding and order of the referee thereon. Whereupon said

referee certified to said judge the question presented, a summary of the evidence relating thereto, the finding and the order thereon. A copy of said order of the referee is filed herewith as a part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 1st day of December, 1899, the judge of the said District Court in reviewing the findings and orders of the referee on said questions, held that said debt was only a common or unsecured claim against said bankrupt's estate and not protected nor secured by the mortgage of April 15th, 1892, but said District Court allowed as a prior and secured claim a debt of twenty-five thousand (\$25,000) dollars due to the Third National Bank by said bankrupt, giving to said bank the entire indemnity afforded by said mortgage of April 15th, 1892, and adjudging to said bank a lien for the entire sum of twenty-five thousand (\$25,000) dollars. A copy of the order of the said District Judge is filed herewith as a part hereof marked "Exhibit D."

Your petitioner further shows that the question of law decided by the District Court was, that under the provisions and construction of the mortgage of April 15th, 1892, your petitioner was not entitled to any share or *pro rata* in the indemnity of said mortgage, or to be substituted to the rights of the mortgagee, A. B., thereunder, but that the Third National Bank was entitled to and should receive all of said indemnity, and be adjudged a lien for the entire sum of twenty-five thousand (\$25,000) dollars.

Your petitioner further shows that at the time the District Court made the order complained of herein there was only twenty-two thousand (\$22,000) dollars of indebtedness of said bankrupt due said Third National Bank which was in existence at the execution of the mortgage, or was created within four years thereafter, and that the balance of said twenty-five thousand (\$25,000) dollars, to wit, three thousand (\$3,000) dollars, was not created until more than four years

after the execution of said mortgage, and said three thousand (\$3,000) dollars was not and is not secured thereunder.

Your petitioner further shows that it is aggrieved by the orders of the said District Court, and injured thereby, and that the error complained of consists:

First. That said District Court did not allow and refused to adjudge your petitioner a lien for its said debt upon the property of said bankrupt's estate under and by virtue of the provisions of the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder, upon the property of the bankrupt described therein, and refused to subrogate your petitioner to said mortgagee's rights.

Second. That said District Court did not allow, and refused to adjudge your petitioner its *pro rata* share upon its said debt of the indemnity afforded the mortgagees in the mortgage of April 15th, 1892.

Third. That said District Court allowed and adjudged to the Third National Bank the full amount of indemnity afforded the mortgagees in the mortgage of April 15th, 1892, to secure a debt of twenty-five thousand (\$25,000) dollars, when your petitioner shows that three thousand (\$3,000) dollars thereof was not and is not secured by said mortgage.

Fourth. That said District Court adjudged that the entire security of said mortgage redounded to the benefit of said Third National Bank, when the debt of said bank is not specifically provided for therein, nor does said mortgage show said bank is entitled to any priority or security superior to your petitioner.

Your petitioner shows that under the provisions of the mortgage of April 15th, 1892, and under the rules of equity and the law of substitution and subrogation, and under section 64, b. 5, chapter 7, of the Bankruptcy Act of 1898, your petitioner is entitled to all the rights of said mortgagee, A. B., to the extent of its said debt, and that thereunder your petitioner has a lien upon the property in said mortgage described to secure its said debt, inferior only to that of the S. Trust Com-

pany, trustee, and Mrs. Anna Mueller, and of equal dignity to the lien of the Third National Bank, and that it was the duty of the District Court to so hold.

Your petitioner asks for an early hearing of this matter, and that the same may be presented upon the petition and exhibits filed herewith, or if your honors so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the clerk of the United States District Court, where said proceedings were had.

Wherefore, your petitioner prays that the order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner a lien for its said debt under the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder for its costs herein, and all proper and equitable relief.

R. X.,

[Verification.]

Attorney for Petitioner.

Taken from the record in Courier-Journal Job Printing Co. *vs.* Schaefer-Meyer Brewing Co., 101 Fed. Rep. 699; 41 C. C. A. 614.

No. 1983.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy under Sec. 67f.

The United States Circuit Court of Appeals

For the ——— Circuit:

In the matter of A. B., } In Bankruptcy.
Bankrupt,

Your petitioner, T. A., comes and shows to the Honorable Court, that on September 10, 1900, A. B. was adjudged a bankrupt in the District Court of the United States for the ——— Division of the ——— District of ———, and that on the 22nd day of the same month your petitioner was duly appointed trustee of the estate of said bankrupt, and having qualified

as such, has since been, and is now, in the discharge of the duties of said trust.

At the time of filing his petition in bankruptcy, the said A. B. was the owner of a stock of merchandise in ——— county, ———, which he had acquired about two months previous, and which constituted all his available assets. In October, 1893, C. Bros. obtained judgment against him in the Supreme Court at ———, for \$——— and cost of suit. An *alias* execution was issued on this judgment by the clerk of the Supreme Court on September 6, 1900, tested the first day of the preceding term, to wit, the second Monday in September, 1899, which came to the hands of the sheriff of ——— county, ———, the next day, and was by him, on September 8, 1900, levied on said stock of merchandise. This with the levy of another execution, precipitated the bankruptcy of A. B., who filed his petition the same day, but a few hours later. He was insolvent when the levy was made, and had been more than four months prior thereto.

Under the orders of the bankrupt court said stock of goods was turned over to petitioner as trustee, who converted the same into cash. The proceeds were enough to pay said judgment and cost, but insufficient to pay all the creditors of said bankrupt.

The said judgment creditors asserted a prior claim to the proceeds of said stock of goods, claiming a lien thereon by virtue of the levy of said execution as of the date of the *teste* of the execution, which your petitioner denied, insisting the levy and whatever lien the creditors obtained by said levy, was avoided by the subsequent bankrupt proceedings had within four months next after the levy. The referee refused to allow the judgment creditors priority, sustaining the contention of the trustee, but his action was overruled by said district judge, who sustained the contention of the said judgment creditors, and ordered the payment of their judgment, interest and cost in full.

Your petitioner excepted to the said action and judgment

of said district judge, and the said creditors and petitioner filed in said court a condensed and agreed statement of facts and the record in the cause, and a duly certified copy of the same is filed herewith as Exhibit No. 1, with the prayer that it be made part of this petition.

Your petitioner shows that the levy and lien created by the levy of said execution, was avoided by the subsequent bankruptcy proceedings, under section 67f of the B. A. of 1898, making null and void all levies, judgments, attachments or other liens, obtained against an insolvent person at any time within four months prior to filing a petition in bankruptcy, and the said trustee is aggrieved by the action and judgment of said district judge in refusing to avoid the levy of said execution and discharge the lien created thereby, thus defeating the lawful application of the section referred to, and preventing a ratable distribution of the estate of said bankrupt amongst all his creditors.

The trustee therefore prays that he be allowed to file this, his petition for a review of the action of said district judge, and that said judgment be reviewed, revised and reversed, and that petitioner be allowed and directed to make a ratable distribution of the estate of said bankrupt amongst all his creditors, and he will ever so pray.

T. A., Trustee.
R. Y., Attorney.

State of —,
County of —, ss.

Personally appeared before me, the undersigned authority, T. A., and makes oath in due form of law, that he is the trustee in the foregoing matter, and is familiar with all the facts set out in the foregoing petition, and that the same are true to the best of his knowledge and belief.

T. A.

Sworn to and subscribed to before me, this — day of —.

[Seal.]

J. N.,

Notary Public in and for —,
County —.

(1) Taken from the record in *In re Darwin*, Petitioner, 117 Fed. 407. Section 67f has been twice amended, by Act of February 5, 1903, and Act of June 15, 1910, wherein the rights of a purchaser in good faith for value are saved.

No. 1984.

**Petition to Revise Order to Pay Over Dividends and Earnings
to Bankrupt's Estate.**

[Caption.]

To the Honorable Judges of the Circuit Court of Appeals
for the Second Circuit of the United States of America:

Your petitioners, Jacob Brantman, and Schoonmaker Bros.
& Brantman, Inc., respectfully show:

I. That on the 17th day of May, 1916, the petitioner
Jacob Brantman was, upon a voluntary petition in bank-
ruptcy filed by him, adjudicated a bankrupt.

II. That at the time your petitioner, Jacob Brantman,
was adjudicated a bankrupt, as aforesaid, he was an officer
and director of Schoonmaker Bros. & Brantman, Inc., the
petitioner herein, a corporation organized under the laws
of the State of New York, and that at said time he was
the owner of one share of stock of the par value of \$100 in
said corporation.

III. That your petitioner, Jacob Brantman, scheduled the
said share of stock as an asset, and upon the appointment
of a trustee herein, your petitioner Jacob Brantman surren-
dered and delivered the said share of stock to the said trustee.

IV. That in addition to his salary for services rendered,
petitioner Jacob Brantman testified that he was entitled to
one-third of the dividends when declared by the said corpo-
ration.

V. That the petitioner Schoonmaker Bros. & Brantman,
Inc., has never declared any dividends, either before or after
the time that the petitioner Jacob Brantman was adjudicated
a bankrupt.

VI. That petitioner Jacob Brantman is not entitled to
one-third of the profits of the petitioner Schoonmaker Bros.
& Brantman, Inc., and that no agreement to that effect was
ever entered into between petitioner Jacob Brantman, and
the petitioner Schoonmaker Bros. & Brantman, Inc., or the
other directors or stockholders thereof.

VII. That your petitioner Schoonmaker Bros. & Brantman, Inc., did not earn the sum of six thousand (\$6000) dollars in profits from the time of its incorporation to the date of the adjudication in bankruptcy of your petitioner, Jacob Brantman, nor had your said petitioner, Schoonmaker Bros. & Brantman, Inc., earned any profits or any sum whatsoever at the time of the adjudication in bankruptcy of your petitioner, Jacob Brantman.

VIII. That the petitioner Jacob Brantman invested no moneys whatsoever, or other property, in the said corporation Schoonmaker Bros. & Brantman, Inc.

IX. That on the 17th day of November, 1916, Louis J. Castellano, trustee in bankruptcy herein, upon a notice of motion dated October 30, 1916, and a petition verified the same day, moved before Hon. Thomas I. Chatfield, one of the judges of the United States District Court for the Eastern District of New York, for an order directing the petitioners to pay to the said trustee, the sum of two thousand (\$2000) dollars, representing one-third of the alleged profits earned by the said petitioner Schoonmaker Bros. & Brantman, Inc.

X. That petitioner Jacob Brantman, by an affidavit verified the 17th day of November, 1916, opposed the said application on the facts therein set forth, and on the ground that the court had no jurisdiction upon the said motion to determine whether there was any indebtedness due from the said petitioner Schoonmaker Bros. & Brantman, Inc., to the petitioner Jacob Brantman, and that the court had no jurisdiction upon the said motion in a summary manner to determine whether at the time of the adjudication herein, the petitioner Schoonmaker Bros. & Brantman, Inc., was indebted to the petitioner Jacob Brantman; and upon the further ground that the court was without jurisdiction upon the said motion in a summary manner to direct the corporation, or its officers, or the petitioner Jacob Brantman, to pay to the trustee the indebtedness, if any, that may exist; and

upon the further ground that the court was without jurisdiction in a summary manner upon the said motion, to make any determination in respect to any claim that the petitioner Jacob Brantman may have had against the said petitioner Schoonmaker Bros. & Brantman, Inc., or to make any order in a summary manner upon the said application in respect of any moneys that may have been due from the petitioner Schoonmaker Bros. & Brantman, Inc., to the petitioner Jacob Brantman at the time of his adjudication in bankruptcy.

XI. That your petitioner, Schoonmaker Bros. & Brantman, Inc., also opposed the said motion.

XII. That on the 1st day of January, 1917, an order was made upon the said motion, directing the petitioners to turn over to the trustee one-third of any sum which may be shown to have been earned by the said petitioner Schoonmaker Bros. & Brantman, Inc., and giving the trustee further relief, and referring the proceeding to a Special Master to examine, take testimony and report as to the amount due.

XIII. That the said order is erroneous, in that it assumes to determine in a summary way, without due process of law, and without a plenary suit, the rights between the petitioner Jacob Brantman and the petitioner Schoonmaker Bros. & Brantman, Inc., and in that it assumed to determine in a summary manner without due process of law, and without a plenary suit, the issue as to what indebtedness, if any, existed from the petitioner Schoonmaker Bros. & Brantman, Inc., to the petitioner Jacob Brantman at the time of his adjudication in bankruptcy, and in that it assumed in a summary manner, without due process of law, to direct petitioners to turn over to the trustee an indebtedness alleged to exist from the petitioner, Schoonmaker Bros. & Brantman, Inc., to the petitioner Jacob Brantman.

XIV. That the said order is erroneous in that the court had no jurisdiction to make the same, and had no jurisdiction

tion to determine the issues in a summary manner upon said motion.

XV. That the said order is erroneous in that it is contrary to law, made upon no evidence to warrant the same, and against the proofs appearing from the affidavits submitted to the court.

XVI. That your petitioners objected to the jurisdiction of the court to make such order.

XVII. That your petitioners feel aggrieved by said order.

Wherefore, your petitioners, being aggrieved by the said order, pray that the said order be revised in matters of law by your Honorable Court, and that your petitioners may have such other and further relief as may be just.

Dated, New York, January 10, 1917.

JACOB BRANTMAN,
SCHOONMAKER BROS. & BRANTMAN, INC.,

By CLIFFORD D. SCHOONMAKER,

H. L.,

President.

Attorney for Jacob Brantman, Petitioner.

T. P. H.,

Attorney for Schoonmaker Bros. & Brantman,
Inc., Petitioner.

[*Verification.*]

Taken from the record in *In re Brantman*, 244 Fed. 101, 156 C. C. A. 529.

MISCELLANEOUS ENTRIES, ORDERS, ETC.

No. 1985.

Stipulation Reducing Record.

The District Court of the United States, for the

— District of —.

A. B., Plaintiff,

vs.

C. D., Defendant.

In the above-entitled case, it is hereby stipulated by the solicitors for the parties hereto that if an appeal be taken, the clerk, in making a transcript of the record may omit therefrom the following papers and records, to wit, [*here set forth the papers and records by name which are to be omitted,*] and that an order may be entered if the same to the court shall seem proper, in accordance with this stipulation.

Dated —.

[To be signed by all the solicitors.]

(1) Unless a stipulation or *praecipe* is filed with the clerk, designating what parts of the record are to be included in making a transcript, it is his duty to send up the whole record in the strict sense of the word, made as directed by R. S. sec. 750. *Keene vs. Whitaker*, 13 Pet. 459; *Curtis vs. Petitpain*, 18 How. 109; *West vs. East Coast Cedar Co.*, 113 Fed. Rep. 737; *Meyer vs. Mansur & Tebbetts Imp. Co.*, 85 Fed. Rep. 874; 29 C. C. A. 465; *R. R. Co. vs. Schutte*, 100 U. S. 644; *Cunningham v. German Ins. Bank*, 103 Fed. Rep. 932; *Nashua & Lowell Corp. vs. Boston & Lowell Corp.*, 61 Fed. Rep. 237 (244), 9 C. C. A. 468.

If the record is too meager the Appellate Court, upon proper application, settles it by a *certiorari*. *Redfield vs. Parks*, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; *Hoskin vs. Fisher*, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. If it contain unnecessary matter, the Appellate Court can rectify this in fixing the costs of the case.

In case the clerk is requested by one party to include a paper in the

transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. *Hoe v. Kahler*, 27 Fed. 145.

The clerk should not transmit original papers except for the purpose of inspection. *Smith v. Craig*, 100 U. S. 226.

No. 1986.

Praeipie Designating Parts of Record to be Included in Transcript of Appeal or Writ of Error.(1)

The District Court of the United States

For the — District of —.

A. B.

vs.

C. D.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the — Circuit, pursuant to an appeal [*or writ of error*] allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

[*Here specify by name each paper desired to be included in the transcript.*]

Respectfully,

X. & X.,

Attorneys for Appellant [*or Plaintiff in Error*].

(1) The certificate of the clerk should show that the transcript of record was made in accordance with *praeipie* of the party removing the case, designating the papers to be included. See *Meyer vs. Mansur & Tebbetts Imp. Co.*, 85 Fed. Rep. 874, 29 C. C. A. 465; *Nashua & Lowell Corp. vs. Boston & Lowell Corp.*, 61 Fed. Rep. 237 (244), 9 C. C. A. 468; *Cunningham vs. German Ins. Bank*, 103 Fed. Rep. 932; *R. R. Co. vs. Schutte*, 100 U. S. 644; *West vs. East Coast Cedar Co.*, 113 Fed. Rep. 737.

It is proper, but not necessary, for counsel to submit *praeipie* to adverse counsel before the transcript is made. In case the clerk is requested by one party to include a paper in the transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. *Hoe vs. Kahler*, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. *Smith vs. Craig*, 100 U. S. 226.

The practitioner should consult the rules of his Circuit Court of Appeals and those of the Supreme Court of the United States, upon occasion. The requirements of these rules are very similar.

No. 1987.**Stipulation for Transcript in Admiralty.(1)****[Caption.]**

It is hereby stipulated by and between the proctors for the respective parties hereto that the following shall be included in the transcript of record on appeal:

1. Libel of The American Ship Building Company.
2. Answer of the Great Lakes Towing Company.
3. Order of court appointing commissioner.
4. All of the testimony taken before the commissioner.
5. Report and findings of the commissioner.
6. Exceptions of respondent to report and findings of the commissioner.
7. Opinion of court overruling the exceptions and confirming finding and report of commissioner.
8. Final decree.
9. Petition for appeal.
10. Assignment of errors.
11. Notice of appeal.
12. Order allowing appeal.

It is further stipulated that the record in the above entitled cause may be printed by appellant in lieu of having it printed under direction of the clerk and that when same is printed it may be submitted to proctors for the parties and if found correct, then stipulated by the parties as a correct and true transcript of the record.

H. & D.,

Proctors for The American Ship Building
Company, Libellant and Appellee.

G. & W.,

Proctors for the Great Lakes Towing Com-
pany, Respondent and Appellant.

(1) The contents of the apostles on appeal are prescribed by Rule 4 of the Circuit Court of Appeals in the 2nd circuit and also in the 9th circuit. See also Rules of the Supreme Court, Rule 8, par. 6. The contents of the record in admiralty from the District Court are prescribed in Admiralty Rule 52.

No. 1988.**Stipulation that but One Transcript Shall be Prepared for
Writs of Error Sued Out by Both Parties.**

[*Caption.*]

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record:

1. That although each of the parties hereto have sued out separate writs of error from the Circuit Court of Appeals of the Eighth Circuit, to review the judgment of the District Court of the United States for the district of Colorado in the above entitled cause, there is no necessity for more than one transcript of record to be prepared and filed as a return to both said writs of error in said Circuit Court of Appeals, and accordingly that but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said writs of error, which transcript of record shall consist of a copy of the complaint, the answer, the demurrer to the answer, the order of court sustaining the demurrer as to certain of the defendant's special pleas or defenses and overruling same as to others, the court's opinion on said demurrer, the stipulation filed by the parties preceding the judgment, the judgment, the petitions of the respective parties for the allowance of writs of error, together with the assignments of errors of the respective parties, the orders of court allowing said writs of error and fixing the bond to be filed by the defendant, the bond filed by defendant and approved by the court, and the respective writs of error and citations issued herein with the returns thereon, and that said single transcript of record so prepared shall serve as a record for both said writs of error in said Circuit Court of Appeals and may be used by each of the parties in said Circuit Court of Appeals on their respective writs of error.

2. That only one printed record shall be prepared in said Circuit Court of Appeals, which shall be entitled in the matter of both said writs of error, and that separate briefs on each writ need not be prepared, and that the argument on

both said writs of error may be heard by said Circuit Court of Appeals at the same time.

3. That the hearing by said Circuit Court of Appeals on both said writs of error shall be had at the December, 1916, term of said court at St. Louis, Missouri.

A. B.,

United States Attorney.

C. D.,

Assistant United States Attorney,

Attorneys for Plaintiff.

T. H., J. P., T. S., Attorneys for Defendant.

No. 1989.

Clerk's Certificate to Record on Appeal and Cross-Appeal.

[*Caption—Venue.*]

I, T. C. MacMillan, clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, do hereby certify that the foregoing is a correct transcript of the record of said District Court in the cause entitled, Consolidated Rubber Tire Company and The Rubber Tire Wheel Company v. B. F. Goodrich Company, on the appeal by the defendant and the cross appeal by plaintiffs as agreed upon by the parties and as ordered by the court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this twenty-second day of August, 1917.

T. C. MACMILLAN,

[*Seal.*]

Clerk.

No. 1990.

Praeceptum of Appellee for Printing Additional Parts of the Record.

[*Caption.*]

To the Clerk of said Court:(1)

Under Rule 23 of this court, the appellee, The Denver & Rio Grande Railroad Company, hereby designates the fol-

lowing additional portions of the record which it requests to be printed:

1. The original bill of complaint.
2. The motion of this appellee [defendant below] to dismiss the same, styled Separate Motion of Defendant, The Denver & Rio Grande Railroad Company, to Dismiss.
3. The order of the court sustaining the aforesaid motion.

A. B. & C. D.,

Solicitors for Appellee.

(1) 8th circuit.

No. 1991.

Stipulation for Use of Transcript Both on Appeal and in Error.

[Caption.]

Now come A. B. and C. D., and United States of America and X. R., and the United States of America and said X. R., not hereby waiving, or intending to waive, any right of objection which either of them may have to any step taken or anything done by the said A. B. and C. D., or either of them, in perfecting or attempting to perfect, or in prosecuting or attempting to prosecute, an appeal or error herein, except as hereinafter expressly stated, it is by said A. B. and C. D., and the United States of America and said X. R. hereby stipulated and agreed that the transcript of the evidence filed herein by A. B. and C. D. shall be considered as having been filed both in their error and appeal proceedings herein.

A. B.,

C. D.,

UNITED STATES OF AMERICA,

By T. R.,

United States Attorney.

X. R.,

By M. N., his Attorney.

No. 1992.**Agreement to Praecept, etc.**

We hereby agree that the above and foregoing praecipe is correct; that the records, documents, papers and proceedings therein set forth are sufficient for a complete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript, and we hereby waive the issuance and service of notice upon any party hereto, and agree that said praecipe shall be obeyed by, and acted upon by, the clerk as fully and to all intents and purposes in the same manner as if said praecipe had been regularly filed and a true copy thereof served upon each party hereto.

(Signed by attorneys.)

No. 1993.**Order Consolidating Appeals and Specifying Papers.**

[Caption.]

On reading and filing the annexed stipulation, it is,

Ordered, That the appeals taken by the defendants, Michael E. Schoening and Dudley Field Malone, be, and the same hereby are, consolidated, and that the records of such appeals may be printed together under one cover and certified as one appeal by the clerk of the United States District Court, and considered by the clerk of the said court and the clerk of this court as such; and it is

Further Ordered, That the record on appeal of the defendant Dudley Field Malone shall consist of his assignment of error, petition of appeal and order allowing same, in addition to the papers filed on behalf of the defendant, Michael E. Schoening.

A. C. C.,

United States Circuit Judge.

The above order is hereby consented to. A. B.,

Attorney for Appellants.

C. D.,

Attorney for Appellee.

No. 1994.**Directions to the Clerk for Making up Transcript of Record on Appeal, Where Interlocutory Injunction Asked.****[Caption.]**

The clerk of said court is hereby instructed by the complainants in the above entitled cause to make up a transcript of the record of said cause in said court for transmission upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the order denying complainants motion for interlocutory injunction therein and in making up same to include therein the following pleadings, papers, documents and exhibits, being all of the record in said cause except the subpoenas and returns thereon:

1. Complainants' bill of complaint.
2. Amendment to bill of complaint.
3. Complainants' affidavit to amendment to bill of complaint.
4. Motion to dismiss bill of complaint as amended.
5. Appearance of Watson and Pasco for certain defendants and their adoption of motion to dismiss.
6. Motion for interlocutory injunction.
7. Notice of hearing of application for interlocutory injunction and acknowledgment of service thereof.
8. Answer of defendants to the bill of complaint.
9. Summary and index to complainants' affidavits.
10. All affidavits and exhibits offered in evidence by complainants in support of application for interlocutory injunction.
11. All affidavits and exhibits offered in evidence by defendants in opposition to motion for interlocutory injunction.
12. Order denying motion for interlocutory injunction.
13. Opinion of court rendered in denying order for interlocutory injunction.
14. Assignment of errors.

15. Application for and allowance of appeal, any order of the court staying proceedings in the District Court in the case, and appeal bond.

16. All other pleadings, proceedings, papers and orders, records and minutes which are or may become or form part of the record in said cause excepting subpoenas and returns thereon as aforesaid.

17. These directions to the court upon behalf of complainants for making up the transcript of record together with proof of service of a copy of same on defendants.

18. Any directions which the defendants in said cause may file with the clerk for or in connection with the making up of said transcript of record.

A. B. & C. D.,

Counsel and Solicitors for Complainants.

Service of copy of foregoing directions to the clerk for making up transcript of record on appeal in said cause acknowledged this — day of —.

J. C. C.,

Counsel and Solicitor for Defendants.

No. 1995.

Stipulation as to Transcript on Writ of Error and Appeal.(1)

[*Caption.*]

It is hereby stipulated and agreed, by and between the parties to the above numbered and entitled cause—

Since the defendant, in addition to the prosecution of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit for the purpose of reviewing the final decree and judgment entered herein July 22, 1916, is also desirous, owing to the doubt which exists as to the proper proceeding to give appellate jurisdiction to said Circuit Court of Appeals for the Eighth Circuit to review the said adjudication, of prosecuting an appeal from said final decree and judgment to said United States Circuit Court of Appeals,—

That the transcript of the record, proceedings and papers, which will be transmitted by the clerk of the District Court to said United States Circuit Court of Appeals pursuant to the mandate of said writ of error, may be treated, considered, and duly authenticated, as the transcript of the record, proceedings, and papers upon which said appeal is based, and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal, which said transcript of the record will be prepared in accordance with the praecipe of the defendant therefor, a copy of which is hereto attached and made a part of this stipulation; and,

That said transcript of the record when printed by the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, shall be entitled, treated and considered as the transcript of the record, both in said writ of error and in said appeal, and said writ of error and said appeal shall be argued and treated as one cause; and,

It is further understood and agreed that this stipulation or a copy thereof, shall be transmitted to said United States Circuit Court of Appeals, as a part of the appeal papers.

A. B. & C. D.,

Attorneys for Plaintiff.

O. R. & S. K.,

Attorneys for Defendant.

(1) Section 4 of the Act of September 6, 1916, 39 Stat. L. 727, provides that when error should have been prosecuted instead of appeal or vice versa, the court will disregard the mistake and entertain the review as if proper proceedings had been had.

No. 1996.

Praecipe for Transcript (Illustrative—General Form).(1)

[*Caption.*]

To the clerk of the above entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United

States Circuit Court of Appeals for the ——— Judicial Circuit, under the writ of error heretofore allowed by said court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Complaint,
Summons,
Demurrer,
Order of ——— (date) overruling demurrer,
Answer,
Reply,
Agreed statement of facts,
Memorandum opinion of the court,
Judgment,
Certificate of clerk to judgment-roll,
Bill of exceptions,
Petition for writ of error and supersedeas,
Assignment of errors,
Order allowing writ of error and fixing supersedeas bond,
Supersedeas bond,
Clerk's certificate to transcript of record,
Writ of error,
Clerk's return to writ of error,
Praeipue for transcript of record,
Citation.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the ——— Circuit.

A. B. and C. D.,

Attorneys for Defendant.

(1) In Dewhurst's Rules of Practice in the United States Courts, 2nd ed., at pp. 845 to 850, are found directions for taking appeals, making up records, and other proceedings in review, promulgated by Honorable Henry T. Meloney, clerk of the Circuit Court of Appeals for the 4th circuit.

No. 1997.**Plaintiff's Notice of Election to Stand on Plea to Jurisdiction,
to Appeal, Requesting Certificate, etc.**

[Caption.]

To —:

The plaintiff elects to stand on its plea or motion to the jurisdiction of the court, and that the question of jurisdiction by the trial court be certified direct to the Supreme Court of the United States, for the term commencing October 8, 1917, upon authority of [here follow citations]. Plaintiff attaches hereto and makes part hereof a full, true and correct copy of the record in said cause and asks this court to identify same as plaintiff's bill of exceptions; and plaintiff attaches hereto and makes part hereof its statement of appeal and prayer for allowance of same, form of judgment entry requested by it, form of citation; and good and sufficient and properly executed appeal bond.

And you are notified that plaintiff will present the foregoing papers to the Honorable —, judge of said court, on the — day of —, 1917, and pray his allowance of said appeal, the signing and filing of said bill of exceptions, the execution of such certificate, the approval of said appeal bond, and an order making same operate as a supersedeas, and any and every such further order as may be necessary to have allowed to perfect said appeal.

A. B.,

Attorney for Plaintiff.

No. 1998.**Praecipe Filed Under Rule 8 of the Supreme Court of the
United States.(1)**

[Caption.]

Come now the appellants, The Public Utilities Commission for the state of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, members of the Public Utilities Commis-

sion for the state of Kansas, H. O. Caster, attorney for the Public Utilities Commission for the state of Kansas, and S. M. Brewster, Attorney General for the state of Kansas, and the defendant cities in Kansas, in pursuance to Rule 8 of the Supreme Court of the United States, and for the purpose of enabling the clerk to prepare the record for appeal herein from the decision of the District Court to the Supreme Court of the United States, hereby requests the clerk to incorporate the portions of the record into the transcript of the record on such appeal which are hereinafter indicated, and additional to the record already prepared in accordance with the praecipies of other appellants, to-wit:

Assignment of errors on behalf of the Public Utilities Commission for the state of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, members of the Public Utilities Commission for the state of Kansas, and H. O. Caster, attorney for the Public Utilities Commission for the state of Kansas, and S. M. Brewster, Attorney General of the State of Kansas.

Appeal and allowance of the Public Utilities Commission for the state of Kansas, Joseph L. Bristow, John M. Kinkel and C. F. Foley, members of said commission, and H. O. Caster, attorney for the Public Utilities Commission for the state of Kansas, and S. M. Brewster, Attorney General for the state of Kansas, and the defendant cities in the state of Kansas.

Bond of the Public Utilities Commission on Appeal.

Citation on appeal, with acknowledgment of service.

Order of severance.

J. and C.,

Attorneys for Appellants.

(1) Rule 8, in the interest of economy of time and expense, provides for selection of parts of the record to be printed.

No. 1999.**Order to Make Transcribed Stenographic Report of Evidence
Part of the Record.**

[*Caption.*]

This cause came on further to be heard upon the thirty-first day of October, 1917, upon the application of the defendant, the city of Kansas City, Missouri, for an order making a part of and incorporating into the record of this cause the transcript of the evidence taken in shorthand by Mr. H. Harcourt Horn during the hearings of this cause and by him transcribed in typewriting, together with the memoranda filed with him in connection with such evidence, and upon consideration thereof

It is ordered that the transcript of the evidence taken in shorthand by Mr. H. Harcourt Horn during the hearings of this cause and by him transcribed into typewriting, together with the memoranda filed with him as a part of such testimony, be and they hereby are made a part of and incorporated into the record of this cause.

W. F. B.,

United States District Judge.

No. 2000.**Order Staying Proceedings Pending Appeal but Permitting
Additional or Ancillary Bills.**

[*Caption in Circuit Court of Appeals.*]

Upon the application of the defendant in the above entitled cause for a stay of proceedings pending appeal, it is hereby

Ordered that the proceedings in the District Court in said cause, including the hearings before the Special Master, be stayed pending the determination of the appeal to this court; but this order shall not stay the operation of the injunction granted by the decree appealed from and is without prejudice to the right of the defendant to make further application to this court for an order of that nature, nor shall this order be taken or construed to prevent complainant from

filing such additional or ancillary bills against other parties as he may deem necessary to protect his interest, and without prejudice to the right of the defendant to make further application in case such a bill or bills are filed.

A. C. C.,
United States Circuit Judge.
H. G. W.,
United States Circuit Judge.
H. W. R.,
United States Circuit Judge.

No. 2001.

Counter-Praecept of Plaintiffs for Transcript.

[*Caption.*]

To the Clerk of said Court:

I received today a copy of defendants' praecipe in this case.

In regard to the tenth item of defendants' praecipe, I assume it is meant to include all of the letters and paper exhibits put in evidence by plaintiffs and defendants, all of which are referred to in the transcript of the proceedings as taken down by Miss Mildred J. Cook.

On behalf of plaintiffs, I insist that the entire file wrapper and contents of plaintiffs' patent (patent No. 970,237) be included in the transcript and not fragmentary parts thereof, as specified in defendants' praecipe. I also insist that the whole of plaintiffs' exhibit U. S. Box Lock Co., 1914 catalogue go up as part of the transcript. As a mere matter of convenience to you in making up the transcript I hand you herewith a duly certified copy of the file wrapper and contents of plaintiffs' patent in suit No. 970,237, so that you can use it in making up the transcript.

St. Louis, April 1, 1916.

(Signed) PAUL BAKEWELL,
Solicitor for Plaintiffs.

Acknowledgment by solicitor for defendants.

No. 2002.**Præcipe for Transcript in Bankruptcy (1).**

[Caption.]

To Clerk:

Please make transcript of following named papers in the above entitled matter:

First. Claim of The E. F. Company.

Second. Petition of trustee to expunge said claim.

Third. Waiver of the E. F. Company as to the filing and date of hearing of said petition.

Fourth. Proceedings before referee in the claim of the E. F. Grocery Company.

Fifth. Petition of The E. F. Co. in review of referee's opinion and order expunging its claim.

Sixth. Opinion of District Judge, Hon. A. C.

Seventh. Decree filed March 28, 1902.

Eighth. Petition on appeal.

Ninth. Assignment of errors.

Tenth. Allowance of appeal.

Eleventh. Citation and service of same.

Twelfth. Motion of the E. F. Co. to correct entry of March 28th, 1902.

Thirteenth. Entry overruling same.

Fourteenth. Præcipe for transcript.

Fifteenth. Certificate.

And file said transcript with clerk of the United States Circuit Court of Appeals for the — Circuit

N. B.,

Trustee in Bankruptcy.

Dated —.

(1) As to this practice see *Cunningham vs. German Ins. Bank*, 103 Fed. Rep. 932.

No. 2003.**Order that Defendant Deliver to Clerk Exhibit to be Transmitted with the Transcript to the Court of Appeals (1).**

[Caption in Trial Court:]

This matter coming on to be heard upon the motion of complainant, therefor, after hearing counsel, on motion of R. X., Esq., solicitor and of counsel for complainant, it is ordered that the defendants in this cause, produce and deliver to the clerk of this court, the original trust deed marked "Exhibit 1," which was produced and offered in evidence at the taking of proofs and hearing of said cause; and that the same be transmitted by the clerk of this court with the record of this case on appeal to the Circuit Court of Appeals, for inspection at the hearing and determination of said cause, and that the same be returned to defendants forthwith after said hearing.

(1) R. S. sec. 698. Original papers can be transmitted to Appellate Court only for inspection and not in lieu of a transcript of them. *Smith vs. Craig*, 100 U. S. 226.

No. 2004.**Order to Send Exhibits to a Circuit Court of Appeals with Transcript.**

[Caption.]

On motion of Messrs. X. & X., solicitors for complainant, it is

Ordered that in addition to the transcript of the record on appeal in this suit that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals for the — Circuit at —, the following original exhibits in this suit to be by him safely kept and returned to this court upon the final determination of the appeal in this suit in said Court of Appeals, viz.:

[Here name exhibits to be transmitted.]

No. 2005.**Order to Send Exhibits to Circuit Court of Appeals.**

[Caption in District Court.]

It is ordered by the court that all original exhibits produced or used at the hearing of the motion for a preliminary injunction in the District Court be forwarded to the clerk of the United States Circuit Court of Appeals for the — Circuit at —, to be used on the hearing of said cause in said Court of Appeals.

No. 2006.**Stipulation that Printed Record May be Certified as Transcript of Record.**

The District Court of the United States

For the — District of — Division—In Equity.

The A. B. Company, Complainant,

vs.

C. D. and E. F.,

Doing Business as the C. D. Company, Defendants.

In the above entitled cause it is stipulated that the foregoing printed volume may be, by the clerk of the District Court returned to the Circuit Court of Appeals as and for the transcript upon the appeal in this cause.

Dated —.

X. & X.,

Solicitors for Complainant.

R. Y.,

Solicitors for Defendants.

No. 2007.**Stipulation to Use Printed Records on a Former Writ of Error.**

[Caption.]

It is agreed by counsel for both sides that this case was heard on being remanded to the record on which it was heard in this court on the former appeal by the A. B. Company, with the addition of certain letters now shown in the transcript as written by Harrison & Dortch, agents of said company, to the said company and its special agent, Kimball, from December 6th, 1896, to January 5th, or 6th, 1897; and it has heretofore been agreed, and is agreed, that the printed record in this court may be used upon this appeal, up to the action of the court in taking the case from the jury on the completion of the hearing, and that the said letters, the said action of the court, and the exceptions filed to such action only need to be printed upon this appeal; the record in this case on this appeal is the same as the record on the former appeal, with the exception of said letters introduced as evidence below, the said action of the court, and the exceptions made thereto by the plaintiffs below.

R. X.,

Attorney for Appellant.

R. Y.,

For Appellees.

No. 2008.**Order Extending Time Within Which to File Record in Appellate Court (1).**

[Caption.]

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is extended until the — day of —.

(1) This order should be filed in trial court and sent to Appellate court

No. 2005.**Order to Send Exhibits to Circuit Court of Appeals.**

[*Caption in District Court.*]

It is ordered by the court that all original exhibits produced or used at the hearing of the motion for a preliminary injunction in the District Court be forwarded to the clerk of the United States Circuit Court of Appeals for the — Circuit at —, to be used on the hearing of said cause in said Court of Appeals.

No. 2006.**Stipulation that Printed Record May be Certified as Transcript of Record.**

The District Court of the United States

For the — District of — Division—In Equity.

The A. B. Company, Complainant,

vs.

C. D. and E. F.,

Doing Business as the C. D. Company, Defendants.

In the above entitled cause it is stipulated that the foregoing printed volume may be, by the clerk of the District Court returned to the Circuit Court of Appeals as and for the transcript upon the appeal in this cause.

Dated —.

X. & X.,

Solicitors for Complainant.

R. Y.,

Solicitors for Defendants.

No. 2007.**Stipulation to Use Printed Records on a Former Writ of Error.**

[Caption.]

It is agreed by counsel for both sides that this case was heard on being remanded to the record on which it was heard in this court on the former appeal by the A. B. Company, with the addition of certain letters now shown in the transcript as written by Harrison & Dortch, agents of said company, to the said company and its special agent, Kimball, from December 6th, 1896, to January 5th, or 6th, 1897; and it has heretofore been agreed, and is agreed, that the printed record in this court may be used upon this appeal, up to the action of the court in taking the case from the jury on the completion of the hearing, and that the said letters, the said action of the court, and the exceptions filed to such action only need to be printed upon this appeal; the record in this case on this appeal is the same as the record on the former appeal, with the exception of said letters introduced as evidence below, the said action of the court, and the exceptions made thereto by the plaintiffs below.

R. X.,

Attorney for Appellant.

R. Y.,

For Appellees.

No. 2008.**Order Extending Time Within Which to File Record in Appellate Court (1).**

[Caption.]

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is extended until the — day of —.

(1) This order should be filed in trial court and sent to Appellate court

as a part of the record, which is a sufficient compliance with Rule 16, C. C. A., and Rule 9 of the Supreme Court.

As to filing record within time see *West Chicago St. R. Co. vs. Ellsworth*, 77 Fed. Rep. 664, 23 C. C. A., 393, and cases cited; *Andrews vs. Thum*, 64 Fed. Rep. 149, 12 C. C. A. 77; *Seagrist vs. Crabtree*, 127 U. S. 773; *Grant vs. Altenberg*, 28 C. C. A. 244, 83 Fed. Rep. 980.

District Judge, who did not sign citation, can not make order extending time to file record. *West vs. Irwin*, 4 C. C. A. 401, 54 Fed. Rep. 419.

No. 2009.

Transcript of Record on Appeal or Writ of Error (1).

United States of America, — District of
— Division, ss.

Record of the proceedings of the District Court of the United States within and for the — Division of the — District of —, in the cause and matter hereinafter stated, and the same being disposed of at a regular term of said court begun and held at the city of —, in said district, on the first Tuesday in —, being the — day of said month, in the year of our Lord one thousand nine hundred and —, and of the independence of the United States of America the one hundred and twenty—, to wit, on the — day of December, A. D. —.

Present, the Honorable H. L., United States District Judge,
and H. G., United States District Judge.

| | | |
|--------|---|--|
| A. B., | { | No. —. |
| vs. | | In Equity. |
| C. D. | | [Or at Law or in Admiralty or Bankruptcy.] |

Said action was commenced on the — day of —, A. D. —, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

[Set out in haec verba the pleadings, evidence or bill of exceptions, orders, decrees and judgments or other papers and

proceedings in said case, including petitions for appeal or writ of error, assignments of error, writ of error and bond and attach to the transcript of record the original citation. Then affix the certificate of the clerk. See Forms Nos. 2010 to 2013].

(1) When an appeal has been allowed or a writ of error sued out, a transcript of the record of the proceedings in the trial court must be prepared and filed in the Appellate Court. It is the duty of the clerk to make it after, and not before, he is directed by counsel to do so. His fees are prescribed by statute, R. S., Sec. 828, and should be paid before the transcript is delivered for filing. If a clerk refuses to produce a transcript he may be compelled to do so by a mandamus or order of court. *U. S. v. Gomez*, 3 Wall. 766; *U. S. v. Booth*, 18 How. 477. Rule 24, par. 7, of the Rules of the Supreme Court fix the fees of the clerk of that court.

No case will be heard in the Appellate Court until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in the Appellate Court shall be filed. Rule 14, Circuit Court of Appeals and Supreme Court Rule 8.

The record should contain only such matter as is necessary to the hearing, and not irrelevant matter or useless repetitions. *Railway Co. v. Stewart*, 95 U. S. 279, 284; *Burnham v. Street Ry. Co.*, 87 Fed. 168, 30 C. C. A. 594; *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 61 Fed. 237, 9 C. C. A. 468; *Union Pac. R. Co. v. U. S.*, 116 U. S. 402. Costs were imposed for padding record in *Ball & Sock Fast. Co. v. Kraetzer*, 150 U. S. 111 (118).

If the record contains such party as is called for by either party, it is sufficient. *Blanks v. Klein*, 49 Fed. 1, 1 C. C. A. 254. It is the duty of the parties or their counsel to attend to this. *Ry. Co. v. Stewart*, 95 U. S. 279, 284; *Burnham v. St. Ry. Co.*, 87 Fed. 168, 30 C. C. A. 594; *Nash. & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 61 Fed. 237, 9 C. C. A. 468; *Union Pac. R. Co. v. U. S.*, 116 U. S. 402.

On appeal or writ of error it will frequently occur that many papers and proceedings ought not to be included in the record. That the clerk may not be left in doubt, he may require of the attorney for the appellant a praecipe stating specifically what the record shall contain and attach a copy of the praecipe to the transcript. Supreme Court Rule 8. *Burnham v. St. Ry. Co.*, 87 Fed. 168, 30 C. C. A. 594; *Penn. Co. v. Ry. Co.*, 55 Fed. 131, 5 C. C. A. 53; *R. R. Co. v. Schutte*, 100 U. S. 644, 647. The certificate in such case should be that it is a true and correct transcript, according to the praecipe. If the attorney for the appellee asks him to include other parts of the record in the transcript, he may apply to the trial court for directions in such matter. *Hoe v. Kahler*, 27 Fed. 145.

Where the record is filed in an Appellate Court, and it is made to appear by the appellee or defendant in error that the necessary papers, etc., have been omitted in making the transcript, they may be supplied upon application to that court. *R. R. Co. v. Schutte*, 100 U. S. 644, 647; *Cunningham v. German Nat. Bank*, 103 Fed. 932. See *certiorari* to complete record, Form No. 2025.

Where witnesses are examined orally, the testimony presented in that form or its substance must be stated in writing and made a part of the record, or it will be entirely disregarded on appeal. *Blease v. Garlington*, 92 U. S. 1. See Rule of May 15, 1893, 149 U. S. 793.

Exhibits attached to depositions are properly included in a record. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481.

The opinion of the court, if in writing, should be annexed to the manuscript. Rule 14, C. C. A., 90 Fed. 112.

The transcript must be authenticated under the seal of the court and be signed by the clerk. *Blitz v. Brown*, 7 Wall. 693. Where the certificate is under the seal of the court it may be amended by adding the signature of the clerk. *Idaho & Ore. Land Imp. Co. v. Bradbury*, 132 U. S. 509.

Admiralty Rule 52 prescribes what papers shall be included in a transcript of record in an admiralty case; and see Rule 4 of Circuit Court of Appeals in the 2nd and 9th circuits.

No. 2010.

Certificate of Clerk to Transcript of Record on Appeal.(1)

United States of America.

— District of —, ss.

I, B. R., clerk of the District Court of the United States for the — District of —, do hereby certify and return to the claim of appeal of The A. B. Manufacturing Company, in a cause pending in said court, wherein the A. B. Manufacturing Company is plaintiff and C. D. is defendant, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at —, in said district, this — day of —, in the year of our Lord one thousand

nine hundred and — and of the independence of the United States, the one hundred and twenty—. B. R.,

[Seal.]

Clerk of the District Court of the United States for the — District of —.

(1) A transcript of record must be authenticated under the seal of the court and be signed by the clerk of the trial court. *Blitz v. Brown*, 7 Wall. 693. A certificate signed A. B., clerk, by C. D., deputy, is a sufficient signature. *Garneau v. Dozier*, 100 U. S. 7. Where the certificate is under the seal of the court it may be amended by adding the signature of the clerk. *Idaho & Ore. Land Imp. Co. v. Bradbury*, 132 U. S. 509.

The fees of the clerk are prescribed by statute, R. S., Sec. 828, and should be paid before the transcript is delivered for filing. If a clerk refuses to produce a transcript he may be compelled to do so by a mandamus or order of court. *U. S. v. Gomez*, 3 Wall. 766; *U. S. v. Booth*, 18 How. 477.

See Act of February 13, 1911, 36 Stat. L. 901, "An Act to Diminish the Expense of Proceedings on Appeal, etc."

No. 2011.

Certificate of the Clerk to Transcript of Record on Writ of Error.(1)

The United States of America,
— Judicial Circuit,
— District of —, ss.

In pursuance of the command of the writ of error within, I, B. R., clerk of the District Court of the United States for the — District of —, herewith transmit a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in this case of A. B. v. C. D. lately pending in the District Court of the United States for the — District of —, under my hand and seal of said court.

Witness my official signature, and the seal of said District Court, at the city of —, in said district, this — day of —, in the year of our Lord one thousand eight hundred

and —, and of the independence of the United States of America the one hundred and —. B. R.,

[Seal.] Clerk of the District Court of the United States for the — District of —.

(1) The transcript should be annexed to this certificate or return. See note to Form No. 2010.

No. 2012.

Certificate of Clerk to Transcript of Record Made Pursuant to Stipulations.

United States of America, — District of —,
— Division, ss.

I, B. R., clerk of the District Court of the United States for the district and division aforesaid, do hereby certify the above and foregoing to be a full, true and correct transcript of the record in the case of A. B. & C. D., as required by the stipulation of counsel filed in said case.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of —, this — day of —, A. D. —. B. R.,

[Seal.] Clerk of the District Court of the United States for the — District of —.

(1) The certificate should show that the transcript of record was made in accordance with a stipulation of counsel or praecipe of the party removing the case, designating the papers to be included, where less than the whole record is sent up. See *Meyer v. Mansur & Tebbetts Implement Co.*, 85 Fed. 874, 29 C. C. A. 465; *Cunningham v. German Ins. Bank*, 103 Fed. 932; *West v. East Coast Cedar Co.*, 113 Fed. 737; *R. R. Co. v. Schutte*, 100 U. S. 644; *Nashua & Lowell Corp. v. Boston & Lowell Corp.*, 61 Fed. 237 (244), 9 C. C. A. 468. See also note to Form No. 2010.

No. 2013.

Return of Writ of Error by Clerk of United States Circuit Court of Appeals.(1)

United States Circuit Court of Appeals, — Circuit.

I, D. J., clerk of the United States Circuit Court of Appeals for the — Circuit, do hereby certify that the fore-

going — pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause wherein J. M. and Company were plaintiffs in error, and J. C. and C. M. were defendants in error, No. —, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the District Court of the United States for the — District of —, on the — day of —, A. D. —.

I do further certify that the original citation with acknowledgment of service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the — Circuit, at the city of —, this — day of —, A. D. —.

[Seal.]

D. J.,

Clerk United States Circuit Court of
Appeals for the — Circuit.

(1) See note to Form No. 2010.

No. 2014.

Appearance.(1)

The United States Circuit Court of Appeals,
for the — Circuit.

No. —.

— Term, 189 —.

A. B., Plaintiff in Error [*or*, Appellant],

vs.

C. D., Defendant in Error [*or*, Appellee].

The clerk will enter my appearance as counsel for the [*as
may be*]. R. X.

(1) This must be signed by a member of the bar of the Supreme Court of the United States or of any District Court of the United States. In the Supreme Court, must be signed by individual (not firm) name, and by one who is a member of the bar of that court.

No. 2015.

**Stipulation to Make Appeal Returnable to Court of Appeals
Sitting in One Place Rather than Another, the
Court Consenting.**

[Caption.]

It is hereby mutually stipulated and agreed that in this cause when the record for appeal is perfected and printed, in keeping with the rules and practice, that this cause shall be returnable and filed in the Circuit Court of Appeals of this district, sitting and being held in the city of New Orleans on the 1st day of January, 1917, with and by consent and approval of said court, instead of being made returnable to the city of Fort Worth, in the state of Texas, it being more convenient for said appeal to be heard in the city of New Orleans, than in the city of Fort Worth, and each and all parties hereto agree that said appeal shall be made returnable to said court sitting at New Orleans, aforesaid, instead of the city of Fort Worth, state of Texas.

Witness our hands this the 8th day of August, 1916.

K. and M.,
Attorneys for Plaintiffs.

A. and W.,
Attorneys for Defendants.

No. 2016.**Agreement as to Record on Appeal.****[Caption.]**

It is hereby agreed by and between the parties to the above entitled cause, under the provisions of Equity Rule 77, that the questions presented by this appeal can be determined by the appellate court without an examination of all the pleadings and evidence, and that the foregoing statement of the case shows how the questions arose and were decided in the District Court, and sets forth so much only of the facts alleged and proved or sought to be proved as is essential to a decision of such questions by the appellate court. It is further stipulated and agreed that the foregoing shall constitute the record on appeal in the above entitled cause and need not be certified by the clerk of the District Court except as an agreed record.

N. H.,

Solicitor for Plaintiffs.

G. A. R.,

Solicitor for Defendants.

No. 2017.**Order as to Agreed Record on Appeal.****[Caption.]**

In the above entitled cause, all parties agreeing thereto, it is ordered that the record annexed to the foregoing agreement of counsel as to the record on appeal shall constitute the record on appeal and that the clerk shall certify it as an appeal record without examining it and without charge except such as may be lawfully made for the certificate itself.

E. A.,

Judge.

No. 2018.**Notice of Election as to Transcript on Writ of Error.****[Caption.]**

A writ of error having heretofore, on the 14th day of August, 1913, been granted and allowed the defendant United Kansas Portland Cement Company, in order to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit, the final judgment heretofore rendered in the above entitled cause, the said The United Kansas Portland Cement Company, plaintiff in error [defendant below], hereby gives notice that it has elected and does elect to take and file in the appellate court, to be printed under the supervision of its clerk, under its rules, a transcript of the record in said cause; and said plaintiff in error [defendant below] hereby waives the right to have said transcript printed pursuant to the provisions of the act entitled "An Act to Diminish the Expense of Proceedings on Appeal and writ of Error, or of Certiorari," approved February 13, 1911, 36 Stat. L. 901.

THE UNITED KANSAS PORTLAND CEMENT CO.,
A. B. and C. D.,
Its Attorneys.

No. 2019.**Clerk's Certificate to Opinion of District Court.**

United States of America,
District of Colorado.—ss.

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby cer-

tify the above and foregoing pages numbered from eighty-one (81) to ninety-one (91), inclusive, to be a true, perfect and complete transcript and copy of the opinion heretofore handed down and filed in said court and in a certain case lately in said court pending, wherein the United States of America was plaintiff, and The Missouri Pacific Railway Company was defendant, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this twenty-seventh day of September, A. D. 1916.

CHARLES W. BISHOP,
Clerk.

No. 2020.

Entry of Certain Proceedings on Appeal by Interveners.

[Caption.]

Come the interveners, J. F. Hasty and Sons, by Rose, Hemingway, Cantrell, Loughborough and Miles, Esqs., their solicitors, and file herein their assignment of errors and petition for appeal, to the Supreme Court of the United States, which appeal is allowed, returnable in thirty (30) days from this date, upon the execution of a bond in the sum of five hundred dollars (\$500.00); and come said interveners and file herein their bond with F. J. Schmutz as surety, which is approved by the judge of this court as sufficient; and said interveners also file herein their directions to the clerk as to the transcript on appeal and notice of election to have the clerk of this court prepare same for the appellate court; and said interveners also file herein their citation with service of the same duly accepted by Moore, Smith and Moore, solicitors for the complainants.

Signatures of Interveners by the Attorneys.

No. 2021.**Appearance of U. S. in Circuit Court of Appeals Without Citation.**

United States Circuit Court of Appeals
For the ——— Circuit.

A. B., *et al.*, Appellants,
vs.

The United States of America, Appellee. } No. ———.

The United States come into court and say that there is no error either in the record or proceedings, or in the giving of the judgment aforesaid, and pray that the said Circuit Court of Appeals may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

H. C.,

United States Attorney
For the United States, Appellees.

No. 2022.**Motion to Dispense with Printing Record.(1)**

[Caption.]

Now comes the appellant [*or* plaintiff in error] and moves the court for leave to prosecute his appeal [*or* writ of error] in this court without printing the record in accordance with the rules of this court.

R. X.,

Attorney for Appellant.

(1) It has been the practice in the Circuit Courts of Appeals to permit a writ of error to be prosecuted *in forma pauperis*, as provided by the Act of Congress of July 20, 1892, 27 Stat. at L. 252; *Volk vs. Sturtevant Co.*, 99 Fed. Rep. 532, 39 C. C. A. 647; *Wickelman vs. A. B. Dick Co.*, 85 Fed. Rep. 851, 29 C. C. A. 436; *Reed vs. Pennsylvania Co.*, 111 Fed. Rep. 714, 49 C. C. A. 572. But see *in re Presto*, 93 Fed. Rep. 523, 35 C. C. A. 394. The Supreme Court in *Galloway v. Fort Worth Bank*, 186 U. S. 177, held that a writ of error could not be prosecuted, without

giving bond as required by R. S., Sec. 1000, under the Act of Congress of July 20, 1892, *supra*. The effect of this ruling is that the security for costs and deposit for costs in the Appellate Court are not affected by the Act of July 20, 1892. Whether printing the record may be dispensed with is still left to the discretion of the Appellate Court, because the printing is done under a rule of court and not under an Act of Congress. It is clear, however, that a poor person can not claim it as a matter of right under the statute above referred to. But under the Amendment of June 25, 1910, 36 Stat. L. 866, errors and appeals are included in the Statute of July 20, 1892, and the privileges accorded to poor persons in the trial court are thereunder extended to them for purposes of review.

No. 2023.

Order to Dispense with Printing Record.(1)

[*Caption.*]

Upon motion of the appellant [*or* plaintiff in error] it is hereby ordered that the printing of the record in this court be dispensed with and no deposit made therefor.

(1) See Form No. 2022.

No. 2024.

Stipulation to Omit Parts of Record in Printing.

The United States Circuit Court of Appeals for the ———
District.

| | | |
|-------------------|---|----------|
| A. B., Appellant, | } | No. ———. |
| vs. | | |
| C. D., Appellee. | | |

In the above cause it is mutually agreed between the parties signing this stipulation that the transcript of the record sent

up by the clerk of the District Court of the United States for the western division of the western district of Tennessee, at Memphis, shall be printed as sent up, except that the following portions thereof may be omitted:

The pages referred to are the manuscript pages of the record:

First. Subpoena in Chancery, p. 53.

Second. Marshal's service of same, p. 54.

Third. Order of continuance, p. 72.

Fourth. Order of continuance, p. 78.

Fifth. Notice of taking depositions, p. 80.

Sixth. Order of continuance, p. 82.

Seventh. Order showing plaintiff's motion to remand, p. 234.

Eighth. Opinion of Hammond, Judge, pp. 235-238.

Ninth. Order of court denying motion to remand, p. 239.

Tenth. Order setting demurrer for hearing, p. 342.

Eleventh. Order setting demurrer for hearing, p. 343.

Twelfth. Order setting demurrer for hearing, p. 344.

Thirteenth. Order setting demurrer for hearing, p. 345.

Fourteenth. Order setting demurrer for hearing, p. 346.

Fifteenth. Order of continuance, p. 457.

Sixteenth. Notice for taking depositions, p. 478.

Seventeenth. Order of continuance, p. 480.

Eighteenth. Transcript of Record in National Revere Bank vs. Potter and others, pp. 481-499.

Nineteenth. Subpoena to answer Cross Bill, p. 546.

Twentieth. Marshal's return of service, p. 547.

Twenty-first. Exhibit "A" to Vogel's deposition, debts due to Hill Shoe Company, pp. 671-693.

Twenty-second. Exhibit "B" to Vogel's deposition, debts due by Hill Shoe Company, and dividends paid, pp. 694-703.

Twenty-third. Exhibit "B" to C. W. Edmonds' deposition being assignment of Mary T. Hill to Edmonds, provided page of the record where the assignment is previously copied is referred to in this connection. Record, pp. 756-760.

Twenty-fourth. Petition of National City Bank of New York, pp. 1035-1036.

Twenty-fifth. Deposition of W. A. Wheatley, pp. 1094-1103.

Twenty-sixth. Deposition of S. L. Moore, pp. 1126-1127.

Twenty-seventh. Order of continuance, p. 1143.

Twenty-eighth. Order of continuance, p. 1309.

Twenty-ninth. This stipulation.

But the appellees reverse the right to insist hereafter, if material or necessary, that many parts of the record are designated to be printed by the appellants, and agreed to by them for that reason, which are not required for the purpose of the appeal.

Dated —.

X. & X.,

For Appellants.

Y. & Y.,

For Appellees.

No. 2025.

Writ of Certiorari for Diminution of Record.(1)

United States Circuit Court of Appeals, for the — Circuit.
United States of America, — Judicial Circuit, ss.:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the — District of —:

Whereas, there is now pending before us a suit in which S. M., receiver of the A. B. Railway Company, and the Mercantile Trust Company are appellants, and C. D., guardian of E. F., and R. H., guardian of G. H., are appellees, which suit was removed into this court by virtue of an appeal from the District Court of the United States for the — district of —; and, whereas, it has been suggested to this court that there is a diminution of the record in said cause because the transcript of record in this court does not contain certain record [*here name the papers claimed to be omitted from the transcript*], which were introduced in evidence as alleged.

We being willing that said omission or defect, if any, may be corrected, herewith return such transcript and do com-

mand that under your seal, distinctly and openly you send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said District Court of the United States to the United States Circuit Court of Appeals for the — Circuit, together with this writ forthwith.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this — day of —, in the year of our Lord one thousand nine hundred and —, and of the independence of the United States the one hundred and twenty —.

F. L.,

[Seal.]

Clerk of the United States Circuit Court
of Appeals for the — Circuit.

(1) The Supreme Court is authorized by Judicial Code, Sec. 262 (former R. S. U. S., Sec. 716), to issue writs of certiorari (*Ex parte Vallandigham*, 1 Wall. 243, 249), to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court. *Luxton v. North River Bridge Co.*, 147 U. S. 337; *U. S. v. Young*, 94 U. S. 258; *Ex parte Gordon*, 1 Black, 503; *Beach M'od. Eq. Prac.*, Sec. 963. See also *Ex parte Hitz*, 111 U. S. 766. Supreme Court Rule 14.

The Circuit Courts of Appeals are vested by the act creating them with power to grant writs of certiorari. Act of March 3, 1891, Sec. 12, 26 Stat. L. 826; Rule 18, C. C. A.; *Merrill v. Floyd*, 2 C. C. A. 58, 50 Fed. 849; *Blanks v. Klein*, 1 C. C. A. 254, 49 Fed. 1; *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23; *Burnham v. Ry. Co.*, 30 C. C. A. 594, 87 Fed. 168; *Dow v. U. S.*, 27 C. C. A. 42, 81 Fed. 1004.

The application for a writ of certiorari to supply an omission or cure a defect in a record should be made to the court in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of certiorari to issue. The petition should be signed and verified. If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court below, commanding it to return a true and complete record, including the omitted or defective parts, if any there be. The order also regularly contains a direction to the clerk of the Appellate Court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The Appellate Court will not undertake to make a record in the inferior court.

The writ of certiorari is regularly issued under the hand and seal of the clerk of the Appellate Court, and is transmitted to the clerk of the court below, together with the transcript and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is to be returned under the seal of the court. It is not necessary to have the return made by the judge. *Stewart v. Ingle*, 9 Wheat. 526. It is regularly made by the clerk.

A writ of certiorari for diminution of the record will not be granted if the application is not made at the first term as required by Supreme Court Rule 14 and Rule 18, C. C. A. See *Chappell v. U. S.*, 160 U. S. 499. Rule 18, C. C. A., is not found in all the circuits, e. g., 6th; and in the 3rd circuit it is numbered 20.

No. 2026.

Return to Writ of Certiorari for Diminution of Record.

United States of America, — District of —.

In pursuance of the command of the within writ of certiorari, I, B. R., clerk of the District Court of the United States within and for the — District of — and the — division thereof, do herewith transmit, under the seal of said court, a full and complete copy of the records referred to in the testimony taken before the master appointed in the cause of the Mercantile Trust Company against the C. & D. Railway Company, in the matter of the intervening petitions of E. F., guardian of G. H., and R. S., guardian of F. S., against said railway company, and inadvertently omitted from the record of said cause now pending on appeal in the Circuit Court of Appeals for the — Circuit, and which by the command of said writ were ordered to be returned.

In testimony whereof, I have affixed my signature as clerk of said court and the seal thereof, at —, in said district, this — day of —, Anno Domini —, and in the — year of the independence of the United States of America.

[Seal.]

B. R.,

Clerk of the District Court of the United
States for the — District of —.

No. 2027.**Writ of Certiorari for Diminution of the Record.**

[*Caption.*]

The President of the United States of America, to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas in a certain suit in said Supreme Court between James B. Gallagher, plaintiff, and Edward O. Scaggs and Marion E. Scaggs, defendants, which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to-wit:

1. Motion to vacate the approval on the 26th day of October, 1915, of appellant's appeal bond filed on November —, 1915.

2. The order of court passed December 1, 1915, vacating said approval.

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Seth Shepard, chief justice of the said Court of Appeals, the 24th day of February, in the year of our Lord one thousand nine hundred and sixteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,

Clerk of the Court of Appeals of the
District of Columbia.

No. 2028.**Clerk's Return to Preceding Writ of Certiorari.**

[*Caption.*]

I, John R. Young, clerk of the Supreme Court of the District of Columbia, do hereby certify in obedience to the writ

of certiorari hereto attached and returned herewith, that the foregoing are true and correct copies of the

"Motion to vacate the approval on the 26th day of October, 1915, of appellants' appeal bond filed on November —, 1915," and

"The order of court passed December 1, 1915, vacating said approval"

containing the words omitted from the record heretofore transmitted to the Court of Appeals of the District of Columbia, in cause entitled James B. Gallagher, plaintiff, v. Edward O. Scaggs and Marion E. Scaggs, Equity No. 33015.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said district, this 28th day of February, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

No. 2029.

Stipulation Correcting Bill of Exceptions in Printed Record.

In the United States Circuit Court of Appeals for the —
Circuit.

| | | |
|----------------------------|---|--------|
| A. B., Plaintiff in Error, | } | No. —. |
| vs. | | |
| C. B., Defendant in Error. | | |

Whereas, it appears in the above entitled cause from the printed record therein that the clerk of the court below failed to include in the record sent up to this court, a part of the bill of exceptions showing the signature of the judge thereto allowing the same, and an order made by the judge extending the time for preparing the bill of exceptions.

It is now herein agreed by the parties through and by their respective counsel that the record in this cause as printed and filed by the clerk on April 3, 1901, be amended by attaching thereto the bill of exceptions hereto attached and marked Ex-

hibit "A" to this stipulation; and also the order of the court in said cause hereto attached and marked Exhibit "B," to this stipulation; and that the same may be filed in this court as part of the record herein, and in so far shall have the same effect as if the record hereto filed had been complete at the time.

This — day of —.

X. & X.,

Counsel for Plaintiff in Error.

Y. & Y.,

Counsel for Defendant in Error.

No. 2030.

Receipt for Record.

[Caption.]

Received this — day of —, from the clerk, a copy of the record herein as counsel for the defendant.

R. Y.,

Counsel for Defendant.

No. 2031.

Motion to Dismiss (1).

The United States Circuit Court of Appeals,
for the — Circuit.

A. B. }
vs. } Motion to Dismiss.
C. D. }

And now comes the defendant in error [*or, appellee*], and moves the court to dismiss the writ of error [*or, appeal*] herein for the following reasons [*here set forth the grounds upon which the motion is based*].

R. Y.,

Counsel for —.

(1) Notice of this motion should be served upon the opposite counsel in the case before the same is heard.

No. 2032.**Motion to Dismiss or to Affirm.**

The Supreme Court of the United States,
for the — Term, 189—.

A. B., Appellant,

vs.

C. D., Appellee.

Comes now the appellee, by his counsel appearing in that behalf, and moves the court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the supreme court of one of the United States, to wit, the supreme court of the state of —.

And the said appellee, by counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

R. Y.,

Counsel for Appellee for the Purposes
of these Motions.

No. 2033.**Notice of Submission of Motions (1).**

[*Caption.*]

To Messrs. R. X. and S. X., Counsel for Appellant:

Please take notice that on Monday, the — day of —, 1894, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the supreme court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

R. Y.,

Counsel for the Appellee for the Purposes
of these Motions.

(1) See 6th U. S. Supreme Court Rule, Clause 3.

No. 2034.**Order Dismissing Cause on Motion Filed.**

The United States Circuit Court of Appeals,
for the ——— Circuit.

A. B. }
vs. }
C. D. } Order Dismissing Cause on Motion Filed.

Error to [*or*, appeal from] the district court of the United States for the ——— district of ———.

This cause having been called for hearing in its regular order, and a motion by counsel for the plaintiff in error [*or*, defendant in error, *or*, appellant, *or*, appellee, *as may be*] to dismiss this cause having been filed, therefore, in pursuance of said motion, it is now here ordered and adjudged (and decreed) by this court, that the writ of error [*or*, appeal] be, and the same is, hereby dismissed.

No. 2035.**Order Dismissing Case on Call.**

The United States Circuit Court of Appeals,
for the ——— Circuit.

A. B. }
vs. }
C. D. } Order Dismissing Case on Call.

Error to [*or*, appeal from] the district court of the United States for the ——— district of ———.

This cause having been called in its order, and no one appearing for the plaintiff in error [*or*, appellant], therefore, it is now here ordered and adjudged (and decreed) by this court, that the said writ of error [*or*, appeal] be, and the same is hereby dismissed at the cost of plaintiff [*or*, appellant].

No. 2036.

Order Dismissing Cause for Failure to Print (1).

The United States Circuit Court of Appeals,
for the ——— Circuit.

A. B. }
vs. } Order dismissing cause for failure to print.
C. D. }

Error to [*or*, appeal] from the ——— district [*or*, circuit] court of the United States, for the ——— District of ———.

This cause being called for hearing in its regular order, and it appearing to the court that the parties have failed to print the transcript of the record, it is thereupon, in pursuance of the 23d rule of this court, now here ordered and adjudged (and decreed) by this court that the writ of error [*or*, appeal] be, and the same is hereby dismissed, at the costs of the plaintiff in error [*or*, appellant].

(1) See 23d rule, Circuit Court of Appeals.

No. 2037.

Order Dismissing Cause under Rule (1).

The United States Circuit Court of Appeals,
for the ——— Circuit.

A. B., Plaintiff in Error [*or*, Appellant], }
vs. } Order
C. D., Defendant in Error [*or*, Appellee]. } dismissing
Error to [*or*, appeal from] the District Court of the United cause.
States for the ——— District of ———.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the ——— District of ———, and the plaintiff in error [*or*, appellant] having been three times solemnly called by the marshal to come into court and prosecute said writ of error [*or*,

appeal], and failing to appear, it is, thereupon, in pursuance of the 22d rule of this court, and on the motion of Mr. R. X., of counsel for the appellee [*or*, defendant in error], now here ordered, adjudged, (and decreed) by this court, that this cause be, and the same is hereby, dismissed at plaintiff's [*or*, appellant's] costs; and that this cause be, and is hereby, remanded to the said District Court to be proceeded in according to law and justice.

(1) 16th U. S. Supreme Court Rule, and 22d Rule Circuit Court of Appeals.

No. 2038.

Habeas Corpus.

For forms of appellate proceedings in the matter of habeas corpus, see habeas corpus.

No. 2039.

Certificate by Clerk Under 9th Rule of the Supreme Court.

The United States Circuit Court of Appeals
for the ——— Circuit.

| | |
|---|---|
| A. B., Plaintiff in Error [<i>or</i> , Appellant], | } |
| vs. | |
| C. D., Defendant in Error [<i>or</i> , Appellée]. | |

The United States of America,
——— Circuit, ss.:

I, S. F., clerk of the United States Circuit Court of Appeals for the ——— Circuit, do hereby certify that on the ——— day of ———, 1894, an order was entered herein by the Circuit Court of Appeals for the ——— Circuit, directing a mandate to issue, to the District Court of the United States for the ——— District of ———, affirming a judgment of said District Court entered in the clerk's office of said court on the ——— day of ———, 1894, and that on the ——— day of ———, 1894, a writ of error for the review of said order by the

Supreme Court of the United States was duly sued out by A. B., and allowed by the Honorable E. H., district judge, and issued from the clerk's office of the United States Circuit Court of Appeals for the — Circuit, which writ of error was returnable in the Supreme Court of the United States on —, 1894; that on or about the same day a bond as security for the costs upon said writ of error and a citation for the said return day were duly approved and signed by the said district judge, which writ of error, citation, and bond were duly served on the attorney for the defendant in error on —, 1894.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of —, in the — circuit, this — day of —, in the year of our Lord 1894, and of the independence of the said United States the one hundred and eighteenth.

S. F.,

[Seal.]

Clerk of the United States Circuit Court
of Appeals for the — Circuit.

No. 2040.

Certificate by Clerk Under Rule 16 Circuit Court of Appeals.

I, B. R., clerk of the District Court of the United States for the — district of —, — division, hereby certify that in a suit in equity in said court, being case No. —, on the docket thereof, brought by A. B., plaintiff, against C. D., and the Board of Trustees of the S. University, defendants, for the partition of certain real estate in — county, —, described in the bill of complaint, and for an account of the rents and profits, said court on the — day of —, entered a final decree finding and holding that neither the plaintiff A. B., nor the defendant C. D., had any right, title, interest or estate in the lands described in the bill, or in the rents or profits thereof, but that the same since the death of C. P. had been and were the property in fee simple of the Board of Trustees of the S. University, and

sustaining the demurrer of the Board of Trustees of the S. University to the bill of complaint and dismissing said bill at the cost of the plaintiff; and that on the same day said A. B., in open court prayed and was duly allowed, an appeal from said decree, which allowance was entered at the foot thereof; and that on the — day of —, said defendant C. D. joined with said A. B. in her prayer for an appeal, and the same was duly allowed by the court.

In testimony whereof I have hereunto set my hand and the seal of said court this — day of —.

B. R.,

Clerk of the District Court of the United
States, — District of —.

No. 2041.

Motion to Docket and Dismiss an Appeal.(1)

United States Circuit Court of Appeals for the — Circuit.

A. B., Appellant,

vs.

C. D., Appellee.

The appellee, C. D., produced the certificate of the clerk of the District Court of the United States for the — district of —, — division, showing that on the — day of — A. B. was duly allowed an appeal from said court to this court from the final decree in the case of A. B., appellant, against C. D., appellee, and that appellant has not docketed said appeal or filed the record thereof with the clerk of this court, although the time therefor has long since elapsed.

He therefore prays that said appeal may be docketed and dismissed.

R. Y.,

Counsel for Appellee.

(1) See Rule 16, C. C. A.; Sup. Ct. Rule 9.

This motion should be accompanied by a certificate of the clerk that the appeal has been taken but not perfected. See Form No. —.

No. 2042.**Motion to Docket and Dismiss Writ of Error.(1)**

United States Circuit Court of Appeals for the ——— Circuit.

A. B., Plaintiff in Error,

vs.

C. D., Defendant in Error.

The defendant in error, C. D., produced the certificate of the clerk of the District Court of the United States for the ——— district of ———, showing that on the ——— day of ———, A. B. duly sued out a writ of error from this court to the said Circuit Court of the United States from the final judgment in the case of A. B., plaintiff in error, against C. D., defendant in error, and that the said plaintiff in error has not docketed said writ of error or filed the record thereof with the clerk of this court although the time therefor has long since elapsed.

He therefore prays that the said writ of error be docketed and dismissed.

R. Y.,

Counsel for Defendant in Error.

(1) See note to No. 2041.

No. 2043.**Judgment on Writ of Error.**

The United States Circuit Court of Appeals,
for the ——— Circuit.

A. B. }
vs. } Judgment.
C. D. }

Error to the District Court of the United States for the
——— District of ———:

This cause came on to be heard on the transcript of the record from the District Court of the United States for the ——— district of ———, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed [*or, reversed, as may be*], and this cause is remanded for further proceedings to be had in said District Court in accordance with this judgment. The costs in this court to be paid by the plaintiff in error, [*or, the defendant in error, or to be divided, as may be*].

No. 2044.

Decree.

The United States Circuit Court of Appeals,
for the — Circuit.

| | | |
|-------------------|---|---------|
| A. B., Appellant, | } | Decree. |
| vs. | | |
| C. D., Appellee. | | |

Appeal from the District Court of the United States for the — district of —.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the — district of —, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is, hereby affirmed [*or, reversed, as may be*], and this cause is hereby remanded for further proceedings to be had in said District Court in accordance with this decree.

No. 2045.

Decree Annulling Former Decree and Revoking a Mandate.(1)

[*Caption.*]

On consideration of the motion made by Mr. S., on a prior day of the present term of this court, to-wit, on Monday,

the — day of —, and of the arguments of counsel thereupon had, as well against as in support of said motion, it is now here ordered, adjudged, and decreed that the judgment and decree of this court, rendered in the above entitled cause, on the — day of —, 1894, be, and the same is hereby declared utterly null and void; and that the mandate of this court directed to the judge of said District Court in this cause be, and the same is, hereby revoked. And it is also now here further ordered that the clerk of this court do forthwith send to the judges of the Circuit Court of the United States for the — district of —, a copy of this order of the court, under the seal of this court, together with a copy of the opinion of this court pronounced this day.

(1) *Ex parte Crenshaw*, 15 Pet. 124.

No. 2046.

Order and Decree Where the Court Has no Jurisdiction.(1)

[*Caption.*]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the — district of —, and was argued by counsel. On consideration whereof, it is the opinion of this court that said District Court, from which this cause was removed, had no jurisdiction of this cause, and that consequently this court has not jurisdiction but for the purpose of reversing the decree of said District Court. Whereupon it is now here ordered and decreed by this court that the decree of the said District Court, entertaining jurisdiction of the cause, be, and the same is, hereby reversed for the want of jurisdiction in that court; and that this appeal be, and the same is, hereby dismissed for the want of jurisdiction; and that this cause be, and the same is, hereby remanded to the said District Court, with directions to proceed therein in conformity to the opinion of this court.

(1) *Cutter v. Rae*, 7 How. 737.

No. 2047.**Decree of Dismissal Framed to Prevent Prejudice.**

[*Caption.*]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the district of —, and was argued by counsel; on consideration whereof this court is of opinion that the decree of the District Court ought to have shown that the bill was dismissed because the deed therein mentioned, being void at law for matter apparent on its face, the plaintiff had not shown any circumstances which disclosed a case proper for the interference of a court of equity to relieve against such void deed. And this court is further of opinion that so much of the said decree as dismisses the bill with costs is erroneous, and ought to be reversed. This court doth therefore reverse and annul the said decree, and direct that the case be remanded to the said District Court with directions to modify the same according to the principles of this decree.

No. 2048.**Decree Reversing a Decree Granting an Injunction with Directions to Dismiss the Bill.(1)**

[*Caption.*]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the — district of —, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause be and the same is hereby reversed with costs, and the cause is remanded to the said District Court with directions to dissolve the injunction and dismiss the bill.

(1) That an Appellate Court may order a bill dismissed upon an appeal from an order granting an injunction. See *Smith v. Vulcan Iron Works*, 165 U. S. 518.

No. 2049.**Judgment, Error to State Court.**

[*Caption.*]

In Error to the Supreme Court of the State of —.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of —, and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this court, that the decision of the said Supreme Court in this cause be, and the same is, hereby affirmed [*or as may be*].

No. 2050.**Order for Mandate in Admiralty.**

[*Caption.*]

This cause having come on to be heard on appeal from the decree of the District Court of the United States for the — district of —, entered herein —, 1894, now, on motion of X. & X., proctors for the libellant and appellant, it is ordered that the said decree be, and the same hereby is reversed, with costs of this court, and that the costs of the District Court be apportioned, and that a mandate issue to said District Court directing said court to proceed in accordance with the opinion of this court.

No. 2051.**Mandate in Admiralty.**

[*Caption.*]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the — District of —, Greeting:

Whereas, lately in the District Court of the United States for the — district of —, before you in a cause between

A. B., libellant and appellee, and the steamship X., whereof L. M. is claimant and appellant, wherein the decree of said court is in the words and figures following, viz.: [*here state the decree of the District Court*], as by the inspection of the transcript of the record of said court, which was brought into the United States Circuit Court of Appeals for the — circuit by virtue of an appeal taken out by said A. B., agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of —, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the United States Circuit Court of Appeals for the — circuit on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now ordered, adjudged, and decree by this court that the decree of the District Court be, and the same hereby is, affirmed, with the costs of this court, amounting to the sum of — dollars.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

[*Add teste.*]

No. 2052.

Mandate.

The United States of America, ss.

The President of the United States of America to the Honorable the Judges of the [*name of court below*], Greeting:

Whereas, lately in the [*name of court below*], before you, or some of you, in a cause between A. B., plaintiff, and

C. D., defendant, judgment was rendered in the words following, to wit, [*here set forth the judgment*], as by the inspection of the transcript of the record of the said [*court below*] court, which was brought into the Supreme Court of the United States by virtue of a writ of error [*or, appeal, as may be*], agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety —, the said cause came on to be heard before the said Supreme Court of the United States [*or, United States Circuit of Appeals for the — circuit*] on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the judgment [*or, decree*] of the said [*court below*] court in this cause be and the same is hereby affirmed [*or, reversed, as may be*], with costs. [*Here add the directions, if any, to the court below, or further relief to either party as costs or damages, etc.*]

You, therefore, are hereby commanded that such [*state directions, as "execution," etc.*], and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said writ of error [*or, appeal*] notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the — day of —, in the year of our Lord one thousand eight hundred and ninety —.

J. K.,

| | | |
|-------------------------------|---|-----------------------------------|
| Costs of |) | Clerk of the Supreme Court |
| Clerk \$ | } | of the United States [<i>or,</i> |
| Printing Record . \$ | | U. S. Circuit Court of Ap- |
| Attorney \$ | | peals for the — Circuit]. |
| \$ | | |

No. 2053.**Mandate of United States Circuit Court of Appeals.**

Filed in U. S. District Court on June 13, 1916.

United States of America, ss.

The President of the United States of America,

To the Honorable the Judge of the District Court of the
United States for the Eastern District of Texas.

Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Texas, before you, in a cause between Vinton Petroleum Company, complainant, and Sun Company, respondent, No. 192 in equity, the following decree was made and entered, to-wit: [*Here follows copy of decree.*] as by the inspection of the transcript of record of the said District Court, which was brought into the United States District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Vinton Petroleum Company, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of November, in the year of our Lord one thousand nine hundred and fifteen, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

It is further ordered, adjudged and decreed that the appellee, the Sun Company, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said District Court. February 28, 1916.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the twelfth day of June in the year of our Lord one thousand nine hundred and sixteen.

[Seal.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.(1)

(1) See as to Mandate, Supreme Court Rules.

Rule 24, par. 5, and Rule 28, where case is dismissed, and Rule 39.

No. 2054.

**Stipulation Staying Issuance of Mandate Under Rule 32, of
the Circuit Court of Appeals and Order.**

[Caption.]

Whereas, The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, is preparing its petition for certiorari, which it intends to file in the Supreme Court of the United States, to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, filed in the above entitled cause; and,

Whereas, the present term of the Supreme Court of the United States will adjourn on May 15, 1915, and said plaintiff in error will be unable to have its said petition for certiorari filed with the Supreme Court at least three days before the adjournment of the present term; and,

Whereas, each of the parties hereto is desirous that the Supreme Court of the United States shall construe and interpret the particular sections of the Federal Hours of Service Act involved herein:

Now, Therefore, it is stipulated by and between the respective parties hereto, the plaintiff in error by E. W. Camp and

Paul Burks, its attorneys, and the defendant in error by Albert Schoonover, United States District Attorney, its attorney, as follows:

That the mandate of the Circuit Court of Appeals in this cause shall be stayed until and including the third Monday in October, 1915, and that an order may be entered herein to that effect;

Provided, however, that if plaintiff in error shall not have filed its proposed petition for certiorari in the Supreme Court of the United States by and including the third Monday in October, 1915, being a day in the October, 1915, term of said court, then and in that case the mandate of the court entitled therein may issue at any time after said date.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

Plaintiff in Error,
By A. B., its Attorney.

THE UNITED STATES OF AMERICA,
By C. D., United States District Attorney,
Its Attorney.

No. 2055.

Order Staying Issuance of Mandate Under Rule 32.(1)

[*Caption.*]

On consideration of the oral motion of Mr. Thomas R. White, made on behalf of counsel for the plaintiff in error, and pursuant to the stipulation of counsel for the respective parties, this day filed therefor, and it appearing to the court that the Interstate Commerce Commission consents thereto, and good cause therefor appearing, it is ordered that the issuance of the mandate under Rule 32 of this court in the above entitled cause be, and hereby is stayed to and including October 18, 1915.(1)

(1) Rule 32 of 9 C. C. A.

No. 2056.**Mandate—Supreme Court to District Court.**

UNITED STATES OF AMERICA, SS.:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Arkansas, Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Arkansas, in a cause between St. Louis, Iron Mountain and Southern Railway Company, complainant, and Robert P. Allen, George W. Bellamy and William F. McKnight, railroad commissioners of the state of Arkansas, and Henry Leigh and George McLean, defendants, No. 1637, wherein the decree of the said Circuit Court, entered in said cause on the 11th day of May, A. D. 1911, is in the following words, viz.:

[Here was recited the decree of the District Court from which the appeal was taken, and which appears herein immediately preceding this mandate.] as by the inspection of the transcript of the record of said cause of the said Circuit Court, which has been brought into the Supreme Court of the United States by virtue of an appeal taken by Robert P. Allen, George W. Bellamy and William F. McKnight, railroad commissioners of the state of Arkansas, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, and that the said Robert P. Allen, et al., commissioners, etc., recover against the said complainant three thousand one hundred and two dollars and fifty-two

cents for their costs herein expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Arkansas, with directions to dismiss the bill without prejudice. June 16, 1913.

You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, chief justice of the, etc. (Signed by the Clerk.)

No. 2057.

**Mandate of United States Supreme Court to District Court
in a Controversy Arising in a Proceeding in Bankruptcy.**

United States of America, ss.:

The President of the United States of America,

To the Honorable the Judge of the District Court of the
United States for the Eastern District of Louisiana,
Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Fifth Circuit, in a cause between J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, appellant, and Texas Transport & Terminal Company, Compagnie Generale Transatlantique and Bank de Mulhouse, appellees, No. 2389, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 8th day of April, A. D. 1913, is in the following words, viz.:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby affirmed;

"It is further ordered, adjudged and decreed that the appellant, J. A. E. Pyle, trustee in bankruptcy of Steele, Miller & Company, and the surety on the appeal bond herein, Southwestern Surety Insurance Company of Oklahoma, be condemned, in solido, to pay the costs in this court, for which execution may be issued out of said District Court,"

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fourteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellees, Texas Transport & Terminal Company et al., recover against the said appellant for their costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Louisiana. June 1, 1915.

You, therefore, are hereby commanded that such execution and proceedings should be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, chief justice of the United States, the twenty-eighth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[*Seal.*]

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Filed July 1, 1915.

No. 2058.

Mandate to State Court.(1)

The United States of America, ss.

The President of the United States of America to the President of the Senate of the State of New York, the Senators, Chancellor and Justices of the Supreme Court of the said State, being the Judges of the Court for the Trial of Impeachments and Correction of Errors, holden in and for the State of New York, Greeting:

Whereas, lately in the court for the trial of impeachments and correction of errors, holden in and for the state of New York, before you, or some of you, in a cause between Charles A. Davis, plaintiff in error, and Isaac Packard, Henry Disdier, and William Morphy, defendants in error, the judgment of the said court for the trial of impeachments and correction of errors was in the following words, to-wit:

"Therefore it is considered by the said court for the correction of errors that the judgment of the Supreme Court aforesaid be and the same is hereby in all things confirmed. It is further considered that the said defendants in error recover against the plaintiffs in error their double costs, according to the statute in such case made and provided, to be taxed in defending the writ of error in this cause, and also interest on the amount recovered, by way of damages," as by the inspection of the transcript of the said court for the trial of impeachments and correction of errors, which was brought into the Supreme Court of the United States by virtue of a

writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and thirty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel, on consideration whereof it is the opinion of this court that the plaintiff in error, being consul-general of the king of Saxony, exempted him from being sued in the state court, by reason whereof the judgment rendered by the court for the trial of impeachments and correction of errors is erroneous. Whereupon it is ordered and adjudged by this court that the judgment of the said court for trial of impeachments and correction of errors be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said court, with direction to conform its judgment to the opinion of this court.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice, and in conformity to the opinion and judgment of said Supreme Court of the United States, and the laws of the United States, the said writ of error notwithstanding.

Witness the Honorable John Marshall, chief justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

WILLIAM THOMAS CARROLL,

[Seal.]

Clerk of the Supreme Court of
the United States.

(1) From *Davis v. Packard*, 8 Peters 312, 314-16.

No. 2059.**Final Decree or Judgment on Mandate.(1)**

The District Court of the United States for the ——— District of ———.

A. B.

vs.

C. D.

On reading and filing the mandate of the United States Circuit Court of Appeals for the ——— circuit, in this cause, bearing date the ——— day of ———, A. D. ———, in obedience to said mandate and in cognizance with the opinion of the said United States Circuit Court of Appeals herein, it is hereby ordered, adjudged and decreed that [*here set out the proper judgment or decree according to the facts of the case*].

(1) For forms of decrees and judgments to be entered consult Forms Nos. —.

The lower court has no power to modify or supersede in the slightest degree the decrees or judgments of a Superior Court. Its duty is simply to execute the mandate of that court. In re Potts, 166 U. S. 263; in re Sanford Fork & Tool Co., 160 U. S. 247.

When the Appellate Court directs further proceedings, as to the power of the inferior court, see The Schooner "Catherine" v. Dickinson, 17 How. 170, 178; The Brig "James Gray," 21 How. 184, 195; Rogers v. Steamer "St. Charles," 19 How. 108, 113; The "Sapphire," 18 Wall. 51.

No. 2060.

Decree by Trial Court on Mandate, Referring to a Master. etc.

[*Caption.*]

This cause coming on to be heard on this 8th day of February, 1913, and it appearing to the court by the mandate of the United States Circuit Court of Appeals filed this day that the decree of this court entered herein April 11, 1912, dismissing the bill of complaint has been reversed and an order directing a decree in favor of the complainants and for an injunction and an accounting to be entered herein has been made.

Now, therefore, it is ordered, adjudged and decreed as follows:

1. That letters patent of the United States No. 554,675, dated February 18, 1896, and issued to Arthur W. Grant for improvements in rubber tired wheels, is a good and valid letters patent.

2. That the complainants herein are the lawful owners of the said letters patent and are entitled to recover the gains, profits, savings and advantages made and derived from the use thereof and to recover damages for the infringement thereof.

3. That the defendant herein has infringed upon the said letters patent and upon the rights of the complainants thereunder and of each of the claims thereof.

4. That the complainants recover of the defendant the gains and profits made by it and the damages sustained by the complainants by reason of such infringement.

5. That this cause be and the same is hereby referred to Charles B. Morrison, esquire, as master to ascertain the amount of such gains and profits and the amount of the damages sustained by said complainants by reason of such infringement; that the defendant file an account with the said master in accordance with the usual practice in equity and the rules of equity of the Supreme Court of the United States relevant thereto; that on such accounting the complainants shall have the right to cause an examination of the officers of the defendant or tenus, or otherwise, and also the production of the books, documents, vouchers and accounts of the defendant and that said defendant attend for such purposes before said master from time to time as said master shall direct; and that all testimony and exhibits offered and used in this cause upon behalf of either party may be referred to and used in such accounting.

6. That a writ of injunction according to the prayer of the bill be issued out of and under the seal of this court perpetually restraining and enjoining said defendant, B. F. Goodrich Company, its associates, officers, servants, agents,

attorneys, employes and workmen and every person acting by and on its behalf from further infringement of said letters patent.

7. That complainants recover of the defendant the costs and disbursements of this suit to be taxed except as heretofore directed by the court, and that execution issue therefor.

Enter, February 8, 1913.(1)

KOHLSAAT,

Judge.

(1) The court to which the mandate is sent has only one duty therein, namely, to follow the mandate and carry it into execution according to its terms. *West v. Brashers*, 14 Pet. 31, 10 L. Ed. 350.

No. 2061.

Decree on Mandate of Appellate Court Reversing Decree of Trial Court.(1)

The District Court of the United States for the — District of —.

A. B.

vs.

C. D.

This cause came on to be heard at this term, and it appearing that the defendants, C. D., auditor, and E. F., treasurer of — county, —, heretofore appeal to the United States Circuit Court of Appeals for the — circuit from the final decree made by this court in this cause on the — day of —, and the United States Circuit Court of Appeals for the — circuit at its October term, —, having duly heard said appeal upon the transcript of the record, and having thereupon ordered, adjudged and decreed that the said decree of this court in this cause be, and the same is hereby reversed with costs, and that said cause is remanded to this court for further proceedings not inconsistent with the opinion of said the United States Circuit Court of Appeals in this case; and the said the United States Circuit Court of Appeals for the — circuit having reversed said decree and remanded this cause to

this court with instructions that such proceedings be had in said cause in conformity with the opinion and decree of said the United States Circuit Court of Appeals for the — circuit, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding, which said order, decree and instructions appear to this court by the mandate of the said the United States Circuit Court of Appeals for the — circuit;

Now, therefore, on filing the said mandate, it is ordered, adjudged and decreed that said final decree of this court be reversed, set aside and held for naught, and that said defendants recover of said plaintiff, A. B., their costs expended in said the United States Circuit Court of Appeals, taxed at \$——, that the exceptions to the answer be and the same are hereby overruled, and that said plaintiff file his replication herein in 10 days from the entry of this decree.

(1) See note to No. 1504.

No. 2062.

Decree on Mandate of Appellate Court Fixing Amounts Due Lienholders (1).

[*Caption in trial court.*]

And on the — day of —, came the complainants, the defendants and interveners and thereupon this cause is submitted for a decree in conformity to the opinions and mandates of the United States Circuit Court of Appeals, upon the appeals taken herein, which opinions and mandates were filed herein, on —, and the court being sufficiently advised, now adjudges, orders and decrees that paragraph 4 of the decree rendered herein, on —, be and the same is corrected and modified as to the claims and mechanics' liens of the following named parties, defendants and interveners, and in lieu of the amounts adjudged as valid liens in their favor, in the said de-

cree of —, the following amounts are now adjudged, ordered and decreed in their favor respectively, as valid liens upon all of the property and franchises of the defendant, The C. & D. Railroad Company, which includes interest at the rate of six per centum per annum, upon the mechanics' lien claims owned and held by the parties who appealed from the said decree of —, from the date of filing the same in the county clerk's office to this date (except as to the mechanics' lien claim of the R. Construction Company upon which interest is calculated from January 1, —, and all other mechanics' lien claims draw interest from the date of the former decree herein until paid, to wit: [*Here set out the allowance to the various lienholders as to D. & Co., one hundred and ninety-one thousand five hundred and fifty-nine dollars and seventy cents (\$191,559.70) with interest at the rate of six per centum per annum from the date of this decree of which the sum of eight thousand, eight hundred and fifty-nine dollars and sixty-six cents (\$8,859.66) with interest at the rate of six per centum per annum from the date of this decree, is for the use of the R. Construction Company*].

[*In like manner state all of the other claims.*]

The foregoing amounts adjudged in this decree, are hereby declared to be prior and superior to the mortgage, and upon equal dignity with each other.

And it is further ordered and adjudged and decreed that the interest allowed on the foregoing lien claims against the property in the hands of the receiver herein, as against said property in the hand of the receiver, shall be paid out of the proceeds of the sale of the property herein, and with the same priority fixed in this decree and in said decree of —, as to the principal of said claims.

And it is further adjudged, ordered and decreed that there shall be included in the fourth division of section 10, of the decree of —, the costs of the appeal taken herein to the United States Circuit Court of Appeals, to wit, the sum of — dollars and — cents (\$—) which shall be paid out

of the proceeds of the sale of said property and the further sum sum of — dollars and — cents (\$—) the costs of copying the transcript of the record on said appeals, which shall likewise be paid out of the proceeds of the sale of said property.

Messrs. X. & X. are allowed the sum of — dollars (\$—) as additional counsel fee for their services in the United States Circuit Court of Appeals; and the further sum of — dollars and — cents (\$—) expenses incurred by them which two sums shall be paid as directed in the sixth paragraph of section 10 of the decree of —.

It is further adjudged, ordered and decreed, that section 6 of said decree of —, shall be so altered as to read as follows: "It is further adjudged and decreed that upon the failure of the C. & D. Railroad Company and of those claiming under it and of any parties having the right to redeem, to pay the sums herein adjudged and adjudged by said decree of —, due to the said persons having liens under the aforesaid statute of the state of —, and the sums with interest aforesaid, adjudged due to the complainants under the first mortgage, as stated in said decree of —, and the costs of this action, on or before the first day of December, —, the equity of redemption in and to the property described in said first mortgage, including that adjudged to have passed under it by clause 5 of said decree of —, is hereby barred and foreclosed, and the same shall be sold as directed in said decree of —, except as charged by this decree."

It is further adjudged, ordered and decreed, that section 10 of said decree of —, shall be so amended as that the commissioner or the court may receive in payment of the balance of the bid of the purchaser, the amount of any lien herein adjudged or adjudged in said decree of —, as well as the bonds or coupons issued under and secured by said first mortgage, at the face of *pro rata* value of such adjudged lien or such bonds or coupons, according to the amount such property shall bring; provided that in any event the purchaser shall at

such time or times as the court may order, pay in cash enough money to satisfy and discharge such sums as are herein, or as may be subsequent orders in this case, be declared payable out of such purchase money, prior in lien to the said mechanics' liens or mortgage bonds, before any distribution is to be made upon such coupons or bonds.

The said commissioners shall not receive any bid for a sum less than — (\$ —) dollars.

It is further ordered, adjudged and decreed that except as hereinbefore stated, said decree of —, shall stand as written.

(1) See note to No. 2060.

No. 2063.

Final Decree on Mandate in Admiralty Affirming Decree.

[Caption in District Court.]

The decree of this court entered herein on the — day of —, 1894, having been affirmed on appeal to the United States circuit court of appeals for the — circuit, as appears from the mandate of said court filed herein the — day of —, 1894, now, on motion of X. & X., proctors for the libellant and appellee, it is ordered, adjudged, and decreed that the libellant above named recover herein the sum of — dollars damages, and for the further sum of — dollars, interest thereon from the date of the report of the commissioner herein, and the further sum of — dollars, costs of this court, and the further sum of — dollars, costs of said court of appeals, making in all the sum of — dollars, for which sum the above-named vessel, her tackle, etc., are hereby condemned.

And it is further ordered, adjudged, and decreed that the stipulation for costs and value on the part of the claimant and the sureties on the bond given on appeal herein, cause the engagements of their stipulations and bond to be performed, or show cause why execution should not issue against their goods, chattels, and lands in satisfaction hereof.

No. 2064.**Final Decree on Mandate in Admiralty Reversing Decree.**

[*Caption in District Court.*]

On reading and filing the mandate of the Supreme Court in this cause, bearing date the — day of —, in the year of our Lord one thousand nine hundred and —, and in obedience to said mandate and in consonance with the opinion of the Supreme Court, herein, it is now ordered, adjudged and decreed that the said propeller Conemaugh and the said propeller New York, were both in fault for the collision set forth in the pleadings in this cause, and that the damages to said vessels and their owners resulting therefrom be equally divided between said Erie & Western Transportation Company and the said Union Steamboat Company;

And it is further ordered, adjudged and decreed, that the underwriters and owners of the cargo of said propeller Conemaugh recover the full amount of their damages against the said Union Steamboat Company and the American Surety Company of New York, its surety upon the bond or stipulation herein filed, with interest at the rate of seven per cent. per annum (that being the rate per annum that judgments and decrees bear in the courts of Michigan under the statute of said state), from the third day of July, 1896, until paid;

And it appearing that the above named interveners were insurers of portions of said cargo and that they have suffered damages on account of said collision, as follows, to wit:

| | |
|--|------------|
| The British & Foreign Marine Insurance Company, Limited, in the sum of..... | \$2,421 84 |
| The Union Marine Insurance Company, in the sum of | 8,553 06 |
| The Marine Insurance Company, Limited, in the sum of | 916 57 |
| The Insurance Company of North America, in the sum of | 7,950 09 |

It is further ordered, adjudged and decreed that the said interveners severally recover from the said Union Steamboat Company and its surety their several damages aforesaid, amounting in all to the sum of \$19,841.56, with interest thereon at the rate of seven per cent. per annum from the third day of July, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into this court, or to the proctors for said interveners, the damages and interest aforesaid, and that in default thereof the said interveners have executions therefor.

And it further appearing that the owners of said cargo and their underwriters, other than the interveners, have suffered damage by said collision in the sum of \$19,627.67, for which the said Erie & Western Transportation Company appears in this suit as trustee only, it is further ordered, adjudged and decreed that said trustee recover from the said Union Steamboat Co. and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of \$19,627.67, with interest thereon at the rate of seven per cent. per annum from July 3, 1896, until paid, and that it have execution therefor.

And it is further ordered, adjudged and decreed that the said Erie and Western Transportation Company recover from the said Union Steamboat Company and its surety aforesaid, the sum of \$13,083.33 (being one-half of the damage to said Conemaugh, less one-half of the damage suffered by the said New York in said collision), together with interest thereon at the rate of seven per cent. per annum from July 3, 1896;

And it is also decreed that the said libellant recover of the said claimant and its surety, \$276.75, as one-half of the costs of said cause in the Supreme Court, and also one-half of all costs of said cause in this court and in the United States Circuit Court of Appeals for the Sixth Circuit;

And it is further ordered that if default be made in the payment of any of said sums, executions issue therefor against the said claimant and its surety aforesaid.

No. 2065.**Petition for Writ of Prohibition (1).**

In the Supreme Court of the United States.

Ex parte Thomas Henry Cooper, Owner }
and Claimant of the British Schooner } No. ____.
"W. P. Sayward." } Original.

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States.

Comes now Thomas Henry Cooper, a British subject, and
gives this honorable court to understand and be informed:

That whereas, by the law of nations, the municipal laws
of a country have no extra territorial force, and can not
operate on foreign vessels on the high seas, and it is legally
impossible, under the public law, for a foreign vessel to com-
mit a breach of municipal law beyond the limits of the ter-
ritorial jurisdiction of the law-making state;

And whereas, the seizure of a foreign vessel beyond the
limits of the municipal territorial jurisdiction for breach of
municipal regulations is not warranted by the law of nations,
and such seizure can not give jurisdiction to the courts of
the offended country, least of all where the alleged act was
committed by the foreign vessel at the place of seizure be-
yond the municipal territorial jurisdiction;

And whereas, by the law of nations, a British vessel sail-
ing on the high seas is not subject to any municipal law ex-
cept that of Great Britain; and by the said law of nations a
British ship so sailing on the high seas ought not to be
arrested, seized, attached, or detained under color of any law
of the United States;

And whereas, by the laws of the United States, as well as
by the law of nations, the district courts of the United States
have not, and ought not to entertain, jurisdiction, or hold
plea of an alleged breach upon the high seas of the muni-
cipal laws of the United States by the captain and crew of a
British vessel, and can acquire no jurisdiction by a seizure

of such vessel on the high seas, though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

And whereas, on the ninth day of July, 1887, there was between the governments and people of Great Britain and the United States profound peace and friendship, which relation of peace and friendship had happily subsisted for nearly three quarters of a century before the said ninth day of July, 1887, and still endure, to the great comfort and happiness of two kindred peoples;

And whereas, on the said ninth day of July, 1887, the schooner "W. P. Sayward," a British vessel, duly registered and documented as such, and having her home port at Victoria, in the province of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as captain and master thereof, was lawfully and peacefully sailing on the high seas, to wit, in latitude $54^{\circ} 43'$ north, longitude $167^{\circ} 51'$ west, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands, in the Behring Sea, as more fully appears by the chart in the record of the proceedings of the district court of the United States in and for the territory of Alaska hereinafter referred to;

And whereas, said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States revenue marine, to wit, the United States revenue cutter, "Rush," cruising under instructions of the secretary of the treasury of the United States for the sole purpose of enforcing the municipal law of the United States, and the said British schooner was thereupon unlawfully, wrongfully, and forcibly detained and seized, and was by force taken by the said "Rush" to the port of Sitka, in the territory of Alaska, United States of America, and within the territory of Alaska and the waters thereof, and within the dominion of the United States, in Behring Sea.

[The petition then recites the proceedings taken in the district court for the district of Alaska by the United States attorney against the schooner for an alleged violation of sec 1956 of the Revised Statutes, the allegations of the libel, and proceeds as follows:]

Without this, however, and the said M. D. Ball, the United States attorney, not in any way alleging, or articulating, that the said seizure was made, or the said killing of seal was done, within any river or bay of the United States, or within a marine league of the coast of any portion of the mainland or any island belonging to the United States, or that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts of the mainland or adjacent islands was within the jurisdiction of the United States.

[The petition then recites the trial, the decision of the district court against the schooner, the motion made by the petitioner in arrest of judgment, the decree of forfeiture, the appeal taken by the petitioner to the supreme court, and concludes as follows:]

And whereas all matters of facts hereinbefore recited and alleged, save and except those of which this honorable court takes judicial notice, appear by the record and proceedings of the district court of the United States in and for the territory of Alaska.

And whereas the said appeal has been dismissed by this honorable court on the application of the claimant, appellant, himself not only because he is advised that there is no appeal given to this court from the district of Alaska by the laws of the United States, but because he is advised that the district court, being wholly without jurisdiction, its decree was and is a nullity, and this honorable court is fully authorized by Section 688 of the Revised Statutes of the United States to prohibit any proceedings in the district court for the enforcement of the same.

And whereas the said Thomas Henry Cooper is advised that in consequence of the dismissal of his appeal, according

to the practice of this honorable court, its mandate will issue in due course without further consideration by this court, which said mandate would, in ordinary course, not only permit, but command the district court of Alaska to proceed to execute its pretended decree of forfeiture, and it is therefore the duty of the said Thomas Henry Cooper, now here, to give this honorable court to understand and be informed of all and singular the matters in this suggestion recited and alleged, to the end that this court shall consider this application for prohibition before issuing its mandate, so that it may either frame a special mandate, or take order that the ordinary mandate shall not reach the district court before the writ of prohibition hereinafter prayed, or a rule to show cause why said writ should not issue, shall be served upon said court.

Wherefore the said Thomas Henry Cooper, the aid of this honorable court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this honorable court to the judge of the district court of the United States in and for the territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree, or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment, or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment, or decree made under color thereof.

Joseph H. Choate,
of Counsel.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

Joseph H. Choate.

Subscribed and sworn to before me this 12th day of January, 1891.

Oscar Luckett,

[Seal.]

Notary Public.

(1) Taken from record *in re* Cooper, 138 U. S., 404. With reference to the jurisdiction of the Supreme Court to issue writs of prohibition, See Judicial Code, Sec. 234, bringing forward R. S. U. S., Sec. 688; see also Foster's Fed. Prac., 5th Ed., Sec. 456.

No. 2066.

Suggestion for Writ of Prohibition (1).

In the Supreme Court of the United States.

| | |
|---|-------------|
| <i>Ex parte</i> Sir John Thompson, K. C. M. G., | } No. ____. |
| Her Britannic Majesty's Attorney-General of Canada. | |

Original.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States :

Comes now Sir John Thompson, K. C. M. G., Her Britannic Majesty's attorney-general of Canada, and gives this honorable court to understand and be informed :

That whereas, by the law of nations the municipal laws of a country have no extraterritorial force, and can not operate on foreign vessels on the high seas, and it is legally impossible, under the public law, for a foreign vessel to commit a breach on municipal law beyond the limits of the territorial jurisdiction of the law-making state ;

And whereas, the seizure of a foreign vessel beyond the limits of the municipal territorial jurisdiction for breach of municipal regulations is not warranted by the law of nations, and such seizure can not give jurisdiction to the courts of the offended country, least of all where the alleged act was

committed by the foreign vessel at the place of seizure beyond the municipal territorial jurisdiction;

And whereas, by the laws of nations a British vessel sailing on the high seas is not subject to any municipal law except that of Great Britain; and by the said law of nations a British ship so sailing on the high seas ought not to be arrested, seized, attached, or detained under color of any law of the United States;

And whereas, by the laws of the United States, as well as by the law of nations, the district courts of the United States have not, and ought not, to entertain jurisdiction or hold plea of an alleged breach upon the high seas of the municipal laws of the United States by the captain and crew of a British vessel, and can acquire no jurisdiction by a seizure of such vessel on the high seas, though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

And whereas, on the ninth day of July, 1887, there was between the governments and peoples of Great Britain and the United States profound peace and friendship, which relations of peace and friendship had happily subsisted for nearly three-quarters of a century before the said ninth day of July, 1887, and still endure to the great comfort and happiness of two kindred peoples;

And whereas, on the said ninth day of July, 1887, the schooner "W. P. Sayward," a British vessel, duly registered and documented as such, and having her home port at Victoria, in the province of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as captain and master thereof, was lawfully and peaceably sailing on the high seas, to wit, in latitude $54^{\circ} 43'$ north, longitude $167^{\circ} 51'$ west, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands, in Behring's Sea, as more fully appears by the chart in the record of the proceedings of

the district court of the United States in and for the territory of Alaska hereinafter referred to ;

And whereas, said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States revenue marine, to wit, the U. S. revenue cutter "Rush," cruising under instructions of the secretary of the treasury of the United States, for the sole purpose of enforcing the municipal law of the United States, and the said British schooner was thereupon unlawfully, wrongfully, and forcibly detained and seized, and was by force taken by the said "Rush" to the port of Sitka, in the territory of Alaska, United States of America, and within the territory of Alaska and waters thereof, and within the dominion of the United States in Behring's Sea ;

And whereas, the British schooner, being as aforesaid so unlawfully, wrongfully, and forcibly seized on the high seas and without the limits of Alaska Territory or the waters thereof, and being so unlawfully, wrongfully, and forcibly brought within the limits of Alaska Territory, and the waters thereof, nevertheless a certain M. D. Ball, an attorney of the United States for the district of Alaska, not ignorant of the premises, but unmindful of the danger of disturbing the peace and harmony subsisting between the United States and Great Britain, did by process out of the district court of the United States in and for the district of Alaska, attach and arrest the said schooner "W. P. Sayward," so, as aforesaid, wrongfully seized while lawfully sailing on the high seas under the protection of the law of nations, and so, as aforesaid, wrongfully and forcibly brought within the said port of Sitka, in the territory of Alaska, and before the judge of the said district court, contrary to the said law of nations, and the laws of the United States, did unjustly draw in plea to answer a certain libel by him, the said M. D. Ball, against the said schooner, her tackle, apparel, boats, cargo, and furniture exhibited and promoted, craftily and subtly therein alleging and articulating that the said schooner "W. P. Sayward," her

tackle, apparel, boats, cargo, and furniture, were seized on the ninth day of July, 1887, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring's Sea belonging to the United States and said district, and that all said property was then and there seized as forfeited to the United States for the following causes: That the said vessel, and her captain, officers, and crew were then and there found engaged in killing fur seal within the limits of Alaska Territory, and in the said waters thereof, in violation of section nineteen hundred and fifty-six of the Revised Statutes of the United States, and that on said ninth day of July, 1887, George R. Ferry and certain other persons whose names were to said attorney unknown, who were then and there engaged on board the said schooner "W. P. Sayward," as seamen and seal hunters, did, under the direction and by the authority of George R. Ferry, then and there master of said schooner, engage in killing, and did kill in the territory and district of Alaska, and in the waters thereof, thirty fur seals, in violation of Section 1956 of the Revised Statutes of the United States in such cases made and provided. Without this, however, and the said M. D. Ball not in any way alleging, or articulating, that the said seizure was made, or the said killing of seal was done within any river or bay of the United States, or within a marine league of the coast of any portion of the mainland or any island belonging to the United States, and that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts of the mainland or adjacent islands was within the jurisdiction of the United States;

And whereas, a demurrer by claimant, filed on the fifteenth day of September, 1887, alleging the insufficiency of the libel, was overruled by the Court on the said fifteenth day of September, 1887, and thereafter the claimant filed his answer,

specifically denying the allegations of the libel that the seizure aforesaid was made within the waters of Alaska Territory, or within the civil or judicial district of Alaska or in any portion of Behring's Sea belonging to the United States, and specifically denying the allegations of the libel that the said vessel, her captain, officers, and crew were then and there found engaged in killing fur seal within the limits of Alaska Territory, or in the waters thereof, or that any of them did kill any fur seal therein;

And whereas, at the trial of said cause, the libellant, through its witnesses, by it called in that behalf, to wit, the captain and officers of the "Rush," did make plain and clear to the court what was not clearly disclosed in the libel, that is to say, the place of the alleged offense, and the place of said seizure, and did support the averments of the claimant's answer, and by its evidence so offered in its behalf and not gainsaid in any way, did show that the place of the alleged killing of seal was without the limits of Alaska Territory or the waters thereof, and that the said seizure was not made, nor said killing of seal done, within the waters of Alaska Territory, or within the civil or judicial district of Alaska, or in any portion of Behring's Sea belonging to the United States, but that the place of the alleged offense, and the place of said seizure, was upon the high seas, to wit, in latitude $54^{\circ} 43'$ north, and longitude $167^{\circ} 51'$ west, fifty-nine miles from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands, in Behring's Sea, which said testimony for libellant, as to place of seizure, and place of alleged offense, was supported by that of the claimant. So that the judge of the district court of the United States for the district of Alaska was fully informed that the seizure had been made, and the said alleged killing of seal done on the high seas without the limits of Alaska Territory or the waters thereof, and that said vessel was brought by force within the jurisdiction of said court, and that, therefore,

under the laws of nations, and under the laws of the United States, he had, and could have, no jurisdiction of the alleged offense, or of the vessel so as aforesaid unlawfully, wrongfully, and tortiously seized without the jurisdiction of the United States and of the court, and so wrongfully and by force brought within the jurisdiction of the United States and of the court, yet, nevertheless, being so fully advised, said judge of the district court of Alaska aforesaid did, on the nineteenth day of September, 1887, in contempt of the authority of the United States, in violation of the laws of the United States, and of the laws of nations, and to the great danger of the friendly relations happily subsisting between Great Britain and the United States, assert and attempt to exercise jurisdiction over the said vessel, the same being the vessel of a friendly nation at peace with the United States, knowing the same to have been unlawfully seized on the high seas without the jurisdiction of the United States, to be alleged and proved to be the same place as the place of seizure, that is to say the high seas, without the limits of the territory of Alaska or the waters thereof, and without the jurisdiction of the United States; all this the said judge well knowing, he did find as fact the killing of fur seal on the ninth day of July, 1887, by the captain and crew of the aforesaid British vessel, the "W. P. Sayward," at the said place of seizure as aforesaid, and did find as conclusion of law that such killing at such place on the high seas, to wit, at the said place of seizure in latitude $54^{\circ} 43'$ north, and longitude $167^{\circ} 51'$ west, and fifty-nine miles from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, was in violation of Section 1956 of the Revised Statutes of the United States, and by reason thereof the libellant was entitled to a decree of forfeiture of said British vessel, her tackle, apparel, boats, cargo, and furniture;

And whereas, after said assertion of jurisdiction to condemn and forfeit said vessel, and before decree or sentence, the claimant did move the court to arrest the decree of for-

feiture, and among other grounds did distinctly set up that the court had no jurisdiction over the subject-matter of the cause, as shown by libellant's own testimony as to place of offense and seizure.

Yet the said court did, nevertheless, in contempt of the authority of the United States, and in violation of the laws of the United States, and in violation of the laws of nations, and to the manifest danger of the peaceful relations of the two countries, assert and attempt to exercise jurisdiction in the premises; and on the nineteenth day of September, 1887, did make and enter a pretended decree of forfeiture to the United States of said vessel, her tackle, apparel, boats, cargo, and furniture, and direct that unless an appeal be taken, the usual writ of *venditioni exponas* be issued to the marshal, commanding him to sell all said property and bring the proceeds into court to be distributed according to law, costs to be taxed and awarded against the claimants.

And whereas, one Thomas Henry Cooper, a British subject, being admitted as the actual owner of the said schooner "W. P. Sayward," by order of the district court to interpose as claimant, did, in order to prevent the execution of said decree, take an appeal to this honorable court on the twenty-sixth day of April, 1888, and docketed the same on the thirtieth day of October, 1888, under No. —.

And whereas, all matters of fact hereinbefore recited and alleged, save and except those of which this honorable court takes judicial notice, appear by the record and proceedings of the district court of the United States in and for the territory of Alaska;

And whereas, the said appeal has been dismissed by this honorable court on the application of the claimant, appellant himself, not only because he was advised that there is no appeal given to this court from the district of Alaska by the laws of the United States, but because he is advised that the district court being wholly without jurisdiction, its decree was, and is, a nullity, and this honorable court is fully author-

ized by Section 688 of the Revised Statutes of the United States to prohibit any proceedings in the district court for the enforcement of the same;

And whereas, the said Sir John Thompson, her Britannic majesty's attorney-general of Canada, is advised that in consequence of the dismissal of the appeal, according to the practice of this honorable court, its mandate will issue in due course, without further consideration by this court, which said mandate would, in ordinary course, not only permit, but command, the district court of Alaska to proceed to execute the pretended decree of forfeiture, and it is therefore eminently proper that this honorable court should understand and be informed of all and singular the matters in this suggestion recited and alleged, to the end that this court shall consider this suggestion for prohibition before issuing its mandate, so that it may either frame a special mandate or take order that the ordinary mandate shall not reach the district court before the writ of prohibition herein suggested, or a rule to show cause why said writ should not issue, shall be served upon this court.

Wherefore the said Sir John Thompson, K. C. M. G., her Britannic majesty's attorney-general of Canada, the aid of this honorable court most respectfully requesting, for said Thomas Henry Cooper, submits to this honorable court that a writ of prohibition ought to be issued out of this honorable court to the judge of the district court of the United States in and for the territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree, or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment, or decree in or about the certain stipulation ex-

acted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause or the enforcing any order, judgment, or decree made under color thereof.

And the said Sir John Thompson, K. C. M. G., her Britannic majesty's attorney-general of Canada, most respectfully informs this honorable court that the fact that this, his suggestion, is presented with the knowledge and approval of the imperial government of Great Britain, will be brought to the attention of the court by counsel duly thereunto authorized by her Britannic majesty's representative in the United States.

Calderon Carlisle,
Counsel for Sir John Thompson, K. C.
M. G., Her Britannic Majesty's At-
torney-General of Canada.

[*Verification.*]

(1) Taken from record in re Cooper, 138 U. S. 404. See Judicial Code, Sec. 234, and Foster's Fed. Prac., 5th Ed., Sec. 456.

No. 2067.

Rule to Show Cause why Writ of Prohibition should not Issue (1).

In the Supreme Court of the United States.

Ex parte: In the matter of J. S., late Collector } No. —, }
of the Customs of the Port of —, Peti- } Original.
tioner. }

On consideration of the petition of J. S., late collector of customs of the port of New York,

It is here now ordered by the court that cause be shown by the judge of the district court of the United States for the southern district of — before this court, at Washington, on the — day of — next, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of prohibition should not be granted as prayed in this petition.

Dated —.

(1) From record *ex parte* Fassett, Collector, 142 U. S., 479.

No. 2068.**Writ of Prohibition (1).**

The United States of America, ss.

The President of the United States, to the Honorable Richard Peters, Esquire, Judge of the District Court of the United States in and for the Pennsylvania District:

It is shown to the judges of the Supreme Court of the United States by Samuel B. Davis, that whereas, by the laws of nations and the treaties subsisting between the United States and the republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of said republic for legal adjudication, by vessels of war belonging to the sovereignty of the said republic, acting under the same, and of all questions incidental thereto, does of right and exclusively belong to the tribunals and judiciary establishments of the said republics, and to no other tribunal or tribunals, court or courts, whatsoever.

Wherefore the said Samuel B. Davis, the aid of the Supreme Court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, do prohibit you from holding the plea aforesaid, the premises aforesaid anywise concerning, further before you: You, therefore, are hereby, prohibited, that you no further hold the plea aforesaid, the premises aforesaid in anywise touching, before you, nor anything in the said District Court attempt, nor procure to be done, which may be in anywise to the prejudice of the said Samuel B. Davis, or to the said corvette, or vessel of war called the Cassius, or in contempt of the laws of the United States; and also, that from all proceedings therein you do, without delay, release the said Samuel B. Davis, and the said corvette or vessel of war called the Cassius at your peril.

Witness the Honorable John Rutledge, Esquire, chief justice

of the said Supreme Court, at Philadelphia, this 24th day of August, in the year of our Lord one thousand seven hundred and ninety-five and of the independence of the United States the twentieth.

J. WAGNER,

District Clerk of the Supreme Court of
the United States.

(1) This writ was issued in U. S. v. Peters, 3 Dall. 121.

No. 2069.

Record of Enrollment.

[Caption.]

On the 21st day of February, 1916, the complainant filed herein its bill of complaint, which is hereto annexed;

Thereupon, on said 21st day of February, 1916, a subpoena ad respondendum issued herein, returnable as provided by law, which is hereto annexed;

On the 1st day of March, 1916, the complainant filed herein an amended bill of complaint, which is hereto annexed;

On the 18th day of March, 1916, the defendant filed herein an answer to the amended bill of complaint, which is hereto annexed;

On the 1st day of May, 1916, this cause came on to be heard in open court upon the pleadings and proofs and was heard by the court, on said 1st day of May, 1916, and on the following day, and was, on the 2d day of May, 1916, submitted to the court for its consideration and decision; and thereafter, on the 15th day of May, 1916, the court handed down its opinion, which was filed in open court, and ordered that a decree be entered herein, and accordingly, on the 15th day of May, 1916, a decree was signed, filed, entered and recorded herein, and is hereto annexed. [Here follows decree.]

Whereupon, said bill of complaint, subpoena ad respondendum, amended bill of complaint, answer to the amended bill

of complaint, and said final decree are hereto annexed; the said final decree being duly signed, filed and enrolled pursuant to the practice of said District Court.

Attest, etc.

W. M. V. D.,

[*Seal.*]

Clerk.

No. 2070.

Certificate and Order Settling and Allowing Statement and Bill of Exceptions.(1)

[*Caption.*].

I hereby certify that the foregoing statement and bill of exceptions has been examined by me, and found conformable to the truth, and contains all the evidence offered or introduced on the trial of said cause; also the findings of said court in full, the objections, rulings, orders, exhibits and all other proceedings had upon said trial, and that the same is true, complete and properly prepared, and I hereby settle, allow and approve the same as the statement of the evidence and bill of exceptions herein.

F. H. R.,

[*Date.*]

Judge.

(1) The above is taken from the case of Great Northern Ry. Co. v. W. H. Reid, 245 Fed. 86, in equity (9 cir., No. 2896), from the transcript of the record.

No authority for a bill of exceptions in equity is found in the old rules or the new ones. Present Rule 46 provides for the taking of testimony in open court; the court shall pass upon the question of admissibility of testimony, and where exceptions to rulings are made, the record shall contain enough to show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception.

All this is merely a part of the record of the proceedings and is not in any sense a formal bill of exceptions.

In other cases in the 9th circuit the practice is not the same; e. g., in *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 245 Fed. 846 (9th cir., No. 2937), at the end of the statement of the evidence and the proceedings is the following:

"Comes now the plaintiff and appellant in the above-entitled cause, and presents this, its statement of the case, and asks to have the same duly allowed, settled, and signed as and for the statement of

the proceedings in the said cause at the trial, and as containing all the evidence material to the hearing of the appeal in said cause."

_____, Attorney for Plaintiff-Appellant.

And the order thereon reads as follows:

"This is to certify that the foregoing statement of evidence and proceedings in said cause is hereby allowed; and that it contains all the evidence material to the hearing of the appeal in said cause, and is hereby ordered filed. A. B., Judge."

In *Twin Falls Co. v. Caldwell et al.*, 155 C. C. A., p. 17 (9th cir., No. 2725), at p. 278 of the transcript of the record, is an order settling statement: "It appearing that the within and foregoing statement of evidence, as amended, was lodged in due time with the clerk of this court, and that notice of such lodgment and of the time of the proposed settlement thereof was given to the solicitors for plaintiffs, and it appearing that the said statement is true, complete and properly prepared.

"It is therefore ordered that the same be settled and allowed as a true, complete and correct statement of the evidence introduced in said cause, reduced to narrative form.

R. N., District Judge."

These latter forms are preferable and it is submitted that the term "bill of exceptions" should not be used in connection with an equity record, unless in the case where a special jury may have been called to aid the court.

No. 2071.

Stipulation Extending Time and Relative to Exhibits and Records in Another Case.

[*Caption.*]

It is stipulated:

1. That the time for settlement of the proposed statement of the evidence before the district judge in the above entitled causes be extended until October 1, 1915.

2. That each party may retain possession of the exhibits introduced by him or it in the above entitled causes, and will produce the same for the inspection of the opposite party whenever desired, and will also produce the same in this or any other court at the time of any hearing; except that any letter or other written, typewritten or printed exhibit may, at the request of either party, and with the approval of the district judge, be incorporated in the proposed statement of evidence.

3. That one record be printed as the record in the above entitled causes and serve as the printed record in each of said causes in the Circuit Court of Appeals.

4. That in the event of the trial of the case pending in the Superior Court of Grand Rapids, in chancery, wherein The O. & W. Thum Company is complainant, and Albert G. Dickinson, doing business as Grand Rapids Sticky Fly Paper Company, is defendant, the evidence stated in narrative form in the printed record in the causes above entitled may be introduced in evidence by either party, subject to objections as respects materiality, relevancy, competency, or for other causes, and subject to the right of the other party, in case the accuracy of the testimony of any witness as contained in narrative form in the statement of the evidence is questioned, to insist upon the production, in lieu thereof, of the stenographer's notes or deposition containing the testimony of such witness in the form of questions and answers.

A. B.,

Solicitor for Plaintiff.

C. D.,

Solicitor for Defendant.

No. 2072.

Prayer for Approval of Statement of Evidence, Approval and Assent of Plaintiff.

[*Caption.*]

The defendant appellant, Great Northern Railway Company, tenders and presents the foregoing as its statement of the evidence in this case and prays that the same be approved by the court and made a part of the record, and the same is accordingly done this 10th day of July, 1916.

The foregoing contains all the testimony, excepting exhibit, in the case in narrative form, and where the testimony herein is set forth in the form of question and answer it is so set forth that the evidence might be clearly understood.

P. M.,

District Judge.

The foregoing statement of the evidence had on the trial of this action is complete, correct and in proper form, and the judge of said court may settle and approve it without notice.

M. H. B.,

Attorney for Complainant.

No. 2073.

Notice of Lodging Statement of Evidence, Praecipe, etc.(1)

[*Caption.*]

To —:

Please to be informed that the plaintiff and the defendants, D. R. and C. S., have prepared a statement of evidence and have, this 12th day of December, 1916, lodged it in the clerk's office for your examination. They have, at the same time, filed with the clerk a praecipe, of which a copy is herewith enclosed for you, indicating the portions of the record to be incorporated into the transcript on their appeals.

They will ask the court to approve the statement on Tuesday, December 26, 1916, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

M. D.,

Solicitor for Plaintiff.

L. M. & M. S.,

Solicitors for Defendants.

(1) See Equity Rules Nos. 75, 76 and 77.

No. 2074.

**Order Approving Statement of Evidence and Directing
Original Exhibit to be Sent to the Court of Appeals.**

[*Caption.*]

The statement of evidence in this case on the bill, the supplemental bill, intervening petition and pleadings in relation thereto, having been duly lodged in the office of the

clerk of this court by appellants and The Superior Portland Cement Company, Justus Collins and others having filed their objections and amendments to said statement of evidence and the same having been satisfactorily adjusted and settled, said statement of evidence on the appeals of Frances H. Williamson, Nannie H. Wright and D. Gregory Wright, is hereby approved by the court.

It further appearing to the court that it is proper and necessary that the minute book of The Superior Portland Cement Company referred to as Exhibit I in the statement of evidence and incorporated therein by reference, should be inspected by the United States Circuit Court of Appeals in its original form, it is hereby ordered said exhibit be transmitted by the clerk to said court in original form in connection with the statement of evidence and transcript, and that such exhibit need not be printed as part of the record herein.

X. H.,
Judge.

No. 2075.

Motion Requesting Leave to Insert Exact Words of Witnesses in the Record.

[Caption.]

Comes appellee, Mobile & Ohio Railroad Company, and presents this its motion to the court and shows:

That in the preparation of the record in the appeal of this cause a full understanding of the cross-examination of witnesses A. B. and C. D., and a full understanding of the testimony of witness X. Z., all being witnesses for the appellant, can not be had without a reproduction of said testimony in the exact words of the said witnesses.

Therefore, appellee prays the court to grant this motion and direct that said testimony be set forth in the said record.

This the — day —.

S. R. P.,
Attorney for Appellee.

No. 2076.**Order Allowing Motion to Reproduce Testimony.**

[*Caption.*]

On motion of appellee made to this court, and on request of appellee, the court, being satisfied that such request is reasonable, directs that the cross-examination of A. B. and C. D. and the entire testimony of X. Z., be reproduced in the record in the exact words of the witnesses.

This the — day —.

H. C. N.,

Judge of the United States District Court for
the Southern District of Missouri.

No. 2077.**Nunc Pro Tunc Order Enlarging Time for Filing Transcript
in Appellate Court.**

[*Caption.*]

Upon application of plaintiff and for good cause shown, the time for filing the record on appeal in the United States Circuit Court of Appeals for the Eighth Circuit is hereby extended nunc pro tunc as of July 15, 1916, to and including September 1, 1916.

D. P. D.

[*Date.*]

District Judge.

I hereby consent to the entry of the above order.

A. L. O.,

Attorney for Defendants.

No. 2078.**Order Allowing Appeal, Directing Same to be Filed and
Alternative Order for Bond.**

[*Caption.*]

This day came the plaintiff, Union Stock Yards National Bank of Wichita, Kansas, by E. B. Anderson, its attorney, and presented its petition for appeal, and its assignment of

errors, and, upon consideration thereof, it is now ordered and adjudged that said petition and assignment of errors be and the same are hereby filed and that the petition for appeal be and the same is hereby allowed, to be reviewed in the United States Circuit Court of Appeals for the Sixth Circuit upon the plaintiff's executing bond, according to law, in the sum of \$2,000.00 if it is desired to supersede the judgment herein; if said bond is not intended to operate as supersedeas, then it may be executed in the sum of \$250.00.

No. 2079.

Petition to Extend Time to File Record on Appeal, Setting Forth Circumstances.(1)

[Caption.]

The petition of R. J. D. would respectfully show that on the — day of —, there was rendered by your Honor a decree denying to the complainant a permanent injunction against the defendants, constituting the Railroad Commission of Mississippi, as was prayed for in the original bill in this cause, and your petitioner would further show that he has been allowed by your Honor for an appeal to the Supreme Court of the United States from that decree and that citation has been issued by your Honor for all the defendants, returnable on the 30th day of April, A. D. 1913.

Your petitioner would further show that because of the great number of exhibits which are in the record of the trial of the cause before your Honor in vacation at Oxford, Mississippi, and because of the largeness of that record, your petitioner does not believe that he will be able to file the same in the Supreme Court of the United States by the 30th day of April, A. D. 1913.

The premises considered, your petitioner prays that he be granted an enlargement of time in which to file the record in the Supreme Court of the United States and that he be allowed thirty (30) days from April 30th, 1915, in addition

to the time allowed by law, and, as in duty bound, your petitioner will ever pray, etc.

MONTGOMERY & MONTGOMERY,
Solicitors for R. J. Darnell.

(1) Rule 16, C. C. A.

No. 2080.

Order Allowing Petition for Extended Time.

[*Caption.*]

This cause came on this day to be heard on the petition of R. J. Darnell, complainant and appellant in the above styled cause, praying for an enlargement of time in which to file the record in this cause in the Supreme Court of the United States.

And, it appearing to the court that the record contains many exhibits and is a large record and that the complainant will hardly have time to file the same in the Supreme Court of the United States by the 30th day of April, A. D. 1913, which is the time required by law.

It is thereupon ordered, adjudged and decreed, that the said complainant and appellant be, and he is hereby allowed in addition to the thirty (30) days allowed him by law, thirty (30) days from April 30, 1915, in which to file the record in this cause in the Supreme Court of the United States.

Ordered, adjudged and decreed, in vacation, this the 9th day of April, A. D. 1915.

H. C. NILES,
District Judge.

No. 2081.

**Petition for Further Enlargement of Time in Which to File
Record on Appeal, and Showing of Diligence in
Complying with Former Orders for Extension.**

[*Caption.*]

The petition of R. J. Darnell, plaintiff and appellant in the above styled cause respectfully sheweth unto your Honor

that on the 20th day of March, 1915, your honor granted to your petitioner an appeal from a decree rendered by your Honor on the 7th day of December, 1914, and that your petitioner filed a bond conditioned according to law which was approved by your Honor on the 31st day of March, 1915; and on the said last mentioned date your Honor issued a citation directed to the defendants and their attorneys of record citing them to appear and show cause in the Supreme Court of the United States why the order and decree appealed from should not be corrected, which said citation was returnable thirty days after date.

Your petitioner further sheweth unto your Honor that on the 9th day of April, 1915, your Honor for cause shown granted to your petitioner an enlargement of time in which to prepare and file the record in the above case in the Supreme Court of the United States, which said order allows the said petitioner and appellant until May 30, 1915, in which to file the said record in the Supreme Court.

Your petitioner further sheweth that on the 8th day of May, 1915, your petitioner through his attorneys filed with the clerk of the said District Court his praecipe showing the parts of the record which he wished to have included in the record, and on the said last mentioned date your petitioner also filed a condensed and narrative form of the evidence which had been taken on the trial of the said cause; and your petitioner also notified the attorneys of record for the defendants of the filing of his praecipe and condensed form of the evidence, and stated that he would ask your Honor to approve the same on the 19th day of May, 1915.

Your petitioner further sheweth that the record has been made up by the clerk and the same contains all of the papers, exhibits, etc., which were set out in the praecipe of the petitioner except that the decree of the court of the 7th day of December, 1915, is not in the record, and it is necessary that the same be included within the record.

Your petitioner further sheweth that he is advised by the attorneys of record for the defendants that because of the

large amount of business which the attorney for the defendant has because of the fact that he is the attorney general of the state of Mississippi, the attorney for the defendant has not been able to go over the record to see if he desires anything else included in the record which is not set out in the praecipe of your petitioner, nor has he, the said attorney for the defendant, had sufficient opportunity in which to inspect the condensed and narrative form of the testimony. Your petitioner further sheweth that the attorneys of record for the defendant have asked that your petitioner pray for a further enlargement of the time in which to file the record in this cause in the Supreme Court of the United States, and the attorneys for the defendants have joined in this petition with the plaintiff.

The premises considered, petitioner prays that he be granted a further enlargement of the time in which to file the record in the above styled cause in the Supreme Court of the United States, and that he be allowed forty-five (45) days from May 30th in addition to the time already granted by the court; and as in duty bound he will ever pray, etc.

M. & M.,

Attorneys for Plaintiff.

G. H. E., Assistant Attorney General,

Attorney for Defendants.

No. 2082.

Order Approving Amended Record and Directing Custody of Exhibits.

[*Caption.*]

At a session of said court held in the city of Cincinnati, on the 10th day of February, A. D. 1917.

Present: The Hon. Howard C. Hollister, district judge.

Upon consideration of the files and records in this cause and the above plaintiff having filed in this cause on to-wit the 27th day of January, 1917, its proposed record on ap-

peal including pleadings, orders, transcripts of testimony, reference to which is hereby made, and the above defendants having proposed an amendment thereto, namely, the insertion of plaintiff's exhibit seven and of defendant's exhibits N, P, R and S and T, and an excerpt from defendant's exhibit H, and said amendment being consented to by plaintiff, therefore, it is,

Ordered, that the plaintiff's said proposed record on appeal lodged in this cause to-wit, January 27, 1917, as amended, be and the same is hereby approved and, it appearing to the court that plaintiff's exhibits No. 2, 4, 9, 10, 11, 18 and 21, and defendant's exhibits A, B, C, D, E, F, G, H, I, L and M are inappropriate for insertion in the printed records, and have not been attached to complainant's proposed record on appeal, it is further ordered that said exhibits shall be kept in the custody of the clerk of this court and by him be transmitted to the United States Circuit Court of Appeals at the time of the hearing of this case on appeal, and the clerk of this court is further directed to transmit all necessary papers, documents and transcripts to the attorneys for the plaintiff to enable them to properly prepare the case on appeal.

HOLLISTER,
District Judge.

The above order is approved as to form.

A. B. & C. D.,
Attorneys for Defendants.

No. 2083.

**Proof of Service of Praeipce, Where Service Made in
Several Ways.**

[Caption.]

In addition to the persons signing the original praecipe filed on —, in the office of the clerk, I served by mail a copy of said praecipe on the following persons, to-wit:
[Here follow names and addresses.]

On the — day of —, in addition to the attorneys signing the additional praecipe filed in the clerk's office on — I served a copy of said additional praecipe by mail on the following persons, to-wit: [*Here follow names and addresses.*]

I served by mail on — the following notice, to-wit:
"To —:

"Please to be informed that the defendants A. B. and C. D. have indicated the printed transcript of record and of testimony and of evidence already filed in this court in the appeal of E. F. as the transcript of record and statement of evidence to be used and relied upon by them in their appeal to the Circuit Court of Appeals for your examination. They have also at the same time filed with the clerk a praecipe, a copy of which is herewith enclosed for you, indicating the portions of the record to be incorporated into the transcript on their appeals.

"They will ask the court to approve the printed transcript and statement of the evidence as the transcript to be used by them in the Circuit Court of Appeals on —, at — o'clock, A. M., or as soon thereafter as counsel can be heard.

"M. N.,

"Attorney for A. B. and C. D."

on the following persons, to-wit: [*Here follow names and addresses.*]

I also served said notice herein set out personally on the following lawyers, to-wit: [*Here follow names and addresses.*]

The following lawyers said that they were no longer interested in the case or further proceedings therein, to-wit:

[*Here follow names.*]

M. N.,

Attorney for A. B. and C. D.

No. 2084.**Agreement to Statement of Evidence Under Equity Rule 75.**

[*Caption.*]

We have examined and read the foregoing 89 pages, comprising all the evidence taken in the case of Emile K. Boisot, trustee; v. Amarillo Street Railway Company, city of Amarillo, intervener, No. 66 in equity, in the United States District Court for the Northern District of Texas, at Amarillo; said evidence being stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted, and the testimony of witnesses being stated in narrative form. And we agree that all parties hereto have received due and legal notice of said statement as required by Equity Rule 75 and we accept service of such notice and hereby waive further notice of the filing of said statement, and we agree that said statement as made may be approved by the trial judge without further notice to any party hereto, and that when so approved may be filed in the clerk's office and become a part of the record for the purposes of the appeal in said cause taken by A. B., trustee, plaintiff, and by R. F., receiver.

K. X.,

Attorney for Plaintiff.

No. 2085.**Order Settling Statement Under Equity Rule 75.**

[*Caption.*]

It appearing that the within and foregoing statement of evidence, as amended, was lodged in due time with the clerk of this court, and that notice of such lodgment and of the time of the proposed settlement thereof was given to the solicitors for plaintiffs, and it appearing that the said statement is true, complete and properly prepared,

It is therefore ordered, that the same be settled and allowed as a true, complete and correct statement of the evidence introduced in said cause, reduced to narrative form.

Dated this — day of —, 1915.

F. S. D.,
District Judge.

No. 2086.

**Certificate of Evidence and Exceptions Under Equity Rule
No. 75.**

[*Caption.*]

The said Joseph Schlitz Brewing Company having prayed and been allowed an appeal from the judgment, order and decree entered herein on the 11th day of April, A. D. 1916, and each and every part thereof to the United States Circuit Court of Appeals in and for the Fifth Circuit, the Court for the purpose of completing the record in the above entitled cause, respecting the proceedings had in said cause and to enable the said Joseph Schlitz Brewing Company to have said proceedings and the judgment, orders and decree entered therein, reviewed upon said appeal, does hereby certify that the following proceedings were had in said cause at the respective times hereinafter stated:

That on March 14, 1914, the said Joseph Schlitz Brewing Company filed in this court its bill of complaint in equity praying that the defendant Houston Ice & Brewing Company, its agents, servants, etc., be enjoined and restrained from using or attempting to use upon or in connection with the sale of beer in brown or dark amber glass bottles, of badge or label in similitude to the trade mark label theretofore adopted, registered and used by the complainant in commerce between the several states of United States, including the states of Texas and Louisiana, and in foreign countries including the country of Mexico, for a temporary restraining order pending the hearing upon said bill and other relief.

That on the 20th day of March, 1914, this court made and filed its order setting motion of the plaintiff for a temporary injunction.

That thereafter and on the 10th day of June, 1914, said complainant appeared by J. V. Meek and Theodore Kronshage, Jr., in support of the said motion for temporary injunction.

That there appeared in opposition to said motion, Jesse Andrews, Esq., of Messrs. Baker, Botts, Parker & Garwood, solicitor and of counsel for the defendant.

That said Joseph Schlitz Brewing Company in support of its said verified bill of complaint with which were filed as exhibits one bottle of complainant's product upon which was attached the label of the complainant, the said package being the package of the complainant as sold upon the market in commerce as aforesaid, together with a package put up, offered for sale and sold by the defendant in alleged similitude to the trade mark label and the arrangement of features, devices and letterpress in alleged similitude to the complainant's dress of package, together with a bottle of complainant's product with the label and in the dress it had been, previously to the adoption of the simulated label of complainant by defendant, offered for sale and sold upon the market, read the affidavits of Emil Bielfied, from which it appeared among other things that the complainant had adopted a peculiar and characteristic device and trade mark label in the year 1894; that said label had been adopted, used and applied upon and in connection with the sale of beer of the complainant in dark amber or brown glass bottles and had been used in commerce between the several states of the United States and with foreign countries; that the said trade mark label had been by the complainant duly registered in the office of the Commissioner of Patents, Washington, D. C., pursuant to the act of Congress of the United States of America in that behalf in April, 1895, trade mark number 26,385 and subsequently under the act of Congress of February 20, 1905, and particularly that part thereof providing

for registration of trade marks in use for longer period than ten years again registered said mark on the 1st of May, 1906, trade mark No. 52,011; that the complainant had been a pioneer in the adoption and use of a solid body-colored label, and that it had enjoyed the exclusive use of said peculiar and distinctive trade mark label in the form, arrangement of lettering and insignia, and the peculiar combination constituting its distinctive dress of package, and that the public had come to know the said complainant's product by its distinctive trade mark label and the combination of elements constituting its dress of package as a badge of origin and as a means of identifying complainant's product, and purchasing it, and that the acts of the defendant in simulating the peculiar trade mark label and the distinctive features thereof in the combination previously adopted by and exclusively used by the complainant, had infringed the rights of the complainant to its injury for which the Court of Equity should afford relief.

On the same day and with the same affidavit, were filed a sworn statement by E. H. Tomlison of Stafford, Texas, that a representative of the Houston Ice & Brewing Company had apprised him that said defendant was putting up beer in a brown bottle with a label similar to that which Schlitz used, and that said beer could be sold for Schlitz beer.

And on the same day were filed with said affidavit and statement aforesaid, affidavits of Henry E. Swendson of Dallas, Texas, J. R. Callaghan of Beaumont, Texas, J. T. Booth of Beaumont, Texas, Geo. A. Buhler of Houston, Texas, and William Guse of Bastrop, Texas, each to the effect that they were acquainted with the product and the dress of package used by the complainant and that they had been served with beer in bottles, the product of the defendant, marked and put up with the alleged simulated label in imitation of complainant's product and that the similarity was such as to cause confusion, and that the same did mislead and deceive the said witnesses because of said similarity.

Complainant further presented to the court numerous labels and numerous bottles of dark amber or brown glass upon which were pasted numerous labels showing the infinite combination of coloring and arrangement of devices not in similitude to complainant's label which might have been adopted by the defendant without subjecting itself to the charge of alleged infringement contained in the bill of complaint.

On behalf of the defendant were filed on the same day, thirteen affidavits by persons who claimed to be familiar with the package of the complainant and with the alleged simulated package of the defendant, expressing the opinion that the said labels were not similar and that they knew of no confusion by reason of the use in connection with the sale or offering for sale of beer in bottles of the defendant's alleged simulated package with the complainant's said package upon the market.

And the court on the same day having heard the arguments of counsel for the complainant and the defendant, and desiring time for consideration and reflection on the matters, facts and things presented to him, in behalf of said motion for said temporary injunction and contrary thereto, took the said matter under advisement.

Thereafter and on the 6th day of October, the said court made and filed its order refusing said temporary writ of injunction.

Thereafter and on or about the 4th day of December, 1914, the counsel for the respective parties duly entered into a stipulation for the taking of testimony for use upon the final hearing of the said case before this court.

Thereafter and on or about the 15th day of January, 1915, the deposition of Emil A. Biefeld and A. C. Baumann, witnesses on behalf of complainant, were taken before Joseph M. Carney, a notary public in and for the county of Milwaukee in the state of Wisconsin, which said depositions were on the 27th day of January duly filed in this court.

Thereafter by consent of counsel for all parties and on the 11th day of February, 1915, the complainant filed its first amended bill of complaint making additional parties defendant in said cause and specially pleading the several registrations of complainant's trade mark label in support of said bill of complaint, and thereupon on motion of the complainant, the court made and entered its order amending the bill of complaint agreeably to the said amendment filed.

Thereafter on the 15th day of February, 1915, the deposition of Peter Breit, a witness on behalf of complainant, was taken before Russell Goss, a notary public in and for Harris county in the state of Texas at his office in the city of Houston, which said depositions were on the 6th day of February, 1915, duly filed in the office of the clerk of this court pursuant to the statute in such cases made and provided.

That thereafter and on the 20th day of February, 1915, the deposition of J. E. Ellis, a witness on behalf of the complainant, was taken before C. R. Triay, a notary public in and for Harris county in the state of Texas, in the city of Houston, and said deposition was duly filed in the office of the clerk of this court on the 22nd day of February, 1915, pursuant to the statute in such cases made and provided.

Thereafter on the 27th day of March, 1915, defendants filed their answer to the amended bill of complaint.

Thereafter and on the 27th day of March, A. D. 1915, at a stated term of this court begun and held in Houston, Texas, the issues joined in the above cause between the parties, came on to be heard before this court, the plaintiff being represented by J. V. Meek, Esq., of Houston, Texas, its solicitor, and Messrs. Theodore Kronshage, Jr., and J. W. McMillan, all of Milwaukee, of counsel, and the defendant by Jesse Andrews, Esq., and W. H. Walne, their attorneys; and upon the hearing of the issues in said cause, the attorneys for the plaintiff in order to establish, maintain and prove the allegations of their said bill offered the testimony of Emil A. Bielfeld, by deposition de bene esse, as follows: * * *

The foregoing certificate of evidence and exceptions, prepared under equity rules, was on this the 9th day of August, 1916, presented to me, also an agreement and stipulation signed by counsel of record for both plaintiff and defendants waiving the setting of a time and date for the presentation for approval of said certificate of evidence and exceptions, and waiving notice of such presentation, and it also being shown and made known to me by said agreement that counsel for both plaintiff and defendants had agreed that said certificate of evidence and exceptions were correct and had been approved by the parties through their counsel, and waiving the presence of counsel for both plaintiff and defendants, the said certificate of evidence and exceptions are now here approved by the court as being a correct certificate of evidence and exceptions, of the proceedings had upon the trial of said cause, and the clerk of the District Court of the United States for the Southern District of Texas, sitting at Houston, Texas, will transmit a copy thereof, as provided under the rules for making up the record for appeal as though Rule 75 had been fully complied with in all respects.

Witness my hand this the 10th day of August, A. D. 1916.

W. T. BURNS,

Judge of the District Court of the United States

O. K., for the Southern District of Texas.

A. B., Solicitor for Defendant.

(1) Taken from the record in Schlitz Brewing Co. v. Houston Ice Co., 241 Fed. 817, 154 C. C. A. 519.

No. 2087.

Stipulation as to Printing Record Under Rule 23.

[*Caption.*]

Defendant not waiving any objection to the issuance of a writ of error,

It is hereby stipulated and agreed that in the above entitled case in which a writ of error has been allowed, the

transcript of the record may be made and the record printed in accordance with Rule 23 of the rules of the United States Circuit Court of Appeals, and this stipulation, in writing, is signed by counsel for the parties and filed with the clerk of the court below as evidence of an agreement to be governed by the terms of said Rule No. 23.(1) R. E. BYRD,
Attorney for United States of America.

HARRISON & LONG,
Attorneys for Chesapeake & Ohio
Railway Company.

(1) See Dewhurst's Rules of Practice in the United States Courts, 2nd ed., pp. 291 to 308, for the 23rd Rule in all the circuits.

No. 2088.

Certificate of Lodgment of Bond and Copies of Writ of Error.

Supreme Court of Arkansas, ss.:

I, P. D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on 29th December, 1914, in the matter of St. Louis, Iron Mountain & Southern Railway Company, a corporation, v. J. T. Craft, as administrator of the estate of Tom Craft, deceased:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Little Rock, Arkansas, this December 29, 1914.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas.
By J. H. CAMPBELL, D. C.

No. 2089.**Stipulation for Correction of Record and Order Thereon.**

[*Caption.*]

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective counsel, that wherever and everywhere in the record in this case heretofore filed in this court the Colorado fire statute (laws of 1903, p. 404) is referred to as Chap. 113 of the laws of 1903, the same is a mere typographical or clerical error, and the correct citation should be Chap. 153 of the laws of 1903.

It is further stipulated that the record may and shall be corrected in that respect, and this stipulation be made a part of the record in this case, and that an order to this effect may be entered by either party thereto without any or further notice to the other.

J. Y.,

United States Attorney.

M. Z.,

Assistant United States Attorney.

A. B., C. D., Attorneys for Defendant.

On reading and filing the foregoing stipulation, it is hereby ordered that the record in this case be corrected in accordance with the above and foregoing stipulation and stand corrected accordingly, and that this order be entered and the foregoing stipulation filed nunc pro tunc as of the 15th day of September, 1916, and that the same be made a part of the record in this cause and transmitted to the United States Circuit Court of Appeals as a part of the transcript of the record in this cause.

J. A. R.,

Judge.

No. 2090.**Stipulation Concerning Bill of Exceptions Where Certain Exhibit Lost.**

[*Caption.*]

The proposed bill of exceptions, and the proposed amendments thereto, having been duly presented by respective coun-

sel, and same having been settled and allowed by counsel by agreement, and said amendments having been incorporated in the said bill of exceptions within due time,

It is therefore stipulated and agreed that the foregoing bill of exceptions is correct, that it contains all of the testimony offered and received, and a correct reference to all the exhibits introduced, and true and correct copies of the material parts of the same, and of all of the proceedings had on the trial of said cause, provided, however,

At the time of the preparation of the within bill of exceptions, defendant's exhibit 1, namely, the official minute book of the Quicksilver Mining Company, could not be found among the exhibits in said cause in the files of the clerk's office of said District Court, nor has the same since been located or discovered. The excerpts contained in the within bill were taken from what purports to be a copy of a certain portion of said minute book in the possession of defendant, plaintiff in error herein.

It is hereby stipulated that in the event the said original exhibit 1, to-wit, the said official minute book of the Quicksilver Mining Company, be discovered, that plaintiff, defendant in error herein, may have corrected any matters or things contained in the within bill, and purporting to be excerpts from said official minute book, which may not be in accordance therewith that is to say, any inaccuracies may be corrected, and in addition thereto, any other or further matters contained in said official minute book may be presented as plaintiff, defendant in error herein, may desire.

It is further stipulated that this bill of exceptions as engrossed, be settled and allowed by Honorable —, judge of said court, in accordance herewith.

(Signed by attorneys.)

No. 2091.**Clerk's Return to Writ of Error and Certificate.**

United States of America, Eastern Division, of the Northern
District of Iowa—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the city of Dubuque, Iowa, this 22d day of April, A. D. 1913.

[Seal.]

LEE MCNEELY,
Clerk of said Court.

United States District Court
Northern District of Iowa.

Filed in the District Court on April 15, 1913.

CERTIFICATE OF CLERK AS TO RETURN OF WRIT OF ERROR.
United States of America, Northern District of Iowa.

I, Lee McNeely, clerk of the District Court of the United States in and for the Northern District of Iowa do hereby certify and return that the writ of error which is hereto attached was served and filed in my office at Dubuque, Iowa, on the 15th day of April, 1913, and a copy thereof at the same time lodged in my office, and I now return the said writ of error and annexed thereto and hereto attached an authenticated copy of the record in the case mentioned in said writ of error, and the citation and proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in said district this 17th day of April, 1913.

LEE MCNEELY,
Clerk United States District Court
Northern District of Iowa.

[Seal.]

United States District Court North-
ern District of Iowa.

No. 2092.**Prayer for Embodying All the Evidence in the Record, and
Objections to Narrative Form.**

[*Caption.*]

The complainant, J. J. G., respectfully objects and excepts to the praecipe of the defendants filed in your Honor's court preparatory to an appeal, and prays that all the evidence heard in the cause be made part of the record and certified therewith.

First. Because if the cause is appealed, it is vitally important to complainant to have the reviewing court hear and read all the evidence, and make the application of the law thereto.

Second. It is practically impossible to make a narrative statement of the evidence which will disclose the vital merits of the cause as it is.

Third. Because a narrative statement or an attempted narrative statement, can not be agreed upon by the counsel upon the respective sides, and any attempt to harmonize the statement must depreciate the value and weight of the evidence.

Fourth. Because the case is one involving questions of fraud and for this reason the reviewing court should have the evidence literally as it is.

For these reasons complainant prays an order making all the evidence a part of the record.

A., B. & C.,

Counsel.

J. J. G.,

By Counsel.

No. 2093.**Consent Order Permitting Printing of Evidence in Full.**

[*Caption.*]

This 11th day of May, 1916, came the plaintiff by his counsel, A. and B., and came also the defendants, X. and Y., by their counsel, R. and M., and thereupon this cause came on

to be heard upon the objection of J. J. G. to the narrative form of the evidence which was filed on the 8th day of May, 1916, also upon the petition of complainant J. J. G., upon said petition for cross-appeal and upon the motion of the complainant to certify and make part of the record all the evidence taken in the case in the exact words of the witnesses ;and it appearing to the court by statement of counsel that the defendants who are appealing herein have no objection to the said evidence on both sides being set out in the said exact words of the witnesses, provided any additional costs incident to such setting out of the exact words of the witnesses over and above what the costs would have been in the narrative form as hereinbefore filed, shall be paid by said J. J. G. when ascertained by the clerk, and the said J. J. G. agreeing thereto, it is therefore adjudged, ordered and decreed by said consent as aforesaid that the said evidence on both sides be set out in the exact words of the witnesses, but that the said J. J. G., regardless of the outcome of this appeal, shall pay such additional costs as aforesaid, over and above what the cost of said evidence in narrative form would have been.

No. 2094.

**Proceedings at Final Hearing—Narrative Form of Testimony
Under Rule 75.(1)**

[*Caption.*]

At the trial of the cause it was conceded by the defendants that the uncertified copy of the patent offered in evidence was a true and correct copy; that the title to the patent was in the plaintiff: that the license agreement exhibit No. 2 was a correct copy of an agreement in force at the date of the trial between the plaintiff and the defendant; that the notice of infringement exhibit No. 3 was duly received by the defendant; that the defendant's lamp exhibit No. 4 was manufactured by the defendant and sold by the defendant within the jurisdiction of the trial court; and that

the book of instructions exhibit No. 5 was published by the defendant and sold with its lamps.

On behalf of the plaintiff, Professor Morton Arendt of Columbia University, New York City, was called as a witness and stated that he had, at the request of the plaintiff, conducted a series of experiments with the lamp, exhibit No. 4. Professor Arendt stated that in operation when the lamp is hanging idle and no current flowing through it the anode is a trifle below the cathode. When the switches are closed so that the lamp will be supplied with current, the automatic tilting mechanism raises the lamp and causes a stream of mercury to flow between the anode and the cathode chamber, which breaks and strikes the arc. When this happens the chamber at the cathode and the narrow orifice are substantially filled with mercury. In perhaps the first twenty-five, thirty or forty minutes of burning—it varies a little, dependent upon atmospheric conditions, etc.—the amount of mercury in the cathode duct or orifice goes down, the level changes, but after that initial change there is no further change in level of mercury for long hours of burning in either the cathode orifice or in the anode chamber. The observations were made a very great number of times, the lamp being started in operation at eight or nine o'clock in the morning and kept burning all day. In the beginning for the first twenty-five, thirty or forty minutes' operation there would be a sinking of level in the orifice of the cathode, and then from that time until evening no appreciable change of level could be observed. The initial change of level was perhaps from $\frac{1}{8}$ " to $\frac{3}{16}$ ", and thereafter the level was permanent, so far as could be determined with the naked eye, without any very accurate measurements.

After a discussion of the claims of the patent, plaintiff rested.

On behalf of the defendant, counsel offered in evidence exhibit A, copy of the file wrapper and contents of the pat-

ent in suit; exhibit B, a copy of the drawing originally filed with the application of the patent in suit; and exhibit C, a copy of a decision in interference proceedings in the United States Patent Office in which the application of the patent in suit was involved.

On behalf of the defendant, Mr. Percy H. Thomas was called as an expert, he having stated his qualifications as an expert in a companion case on patent No. 883,725, as follows: "I am a graduate in electrical engineering of the Massachusetts Institute of Technology in 1893, and I was for several years with the Westinghouse Electric & Manufacturing Company, going through their student course and through their engineering department with various classes of work. I was for four years the chief electrician of the Cooper-Hewitt Electric Company. In that capacity I had full charge of the experiments and investigations in commercial designs and general technical work of that company, involving all these lamps that you have been talking about; and at the present time I am a consulting electrical engineer. I am employed only a very small part of my time by the defendant company. For the last two or three years I have kept in touch with their work. I have had the revising of patent applications which I filed when I was in the employ of the company, and in connection with the prosecution of those patents I have had to give time to the company, and have kept in close touch with their work, but I have given a very few per cent of my time to their work for the last several years."

Mr. Thomas first discussed the patent in suit, stating in substance that it is not necessary for the purpose of an operative lamp that the passage between the illuminating chamber and the cathode chamber shall be relatively smaller than the passage between the illuminating chamber and the anode chamber. There are two adjustments to be made, first, a rough adjustment so that the heat radiating capacity of the cathode shall bear the same relation to the heat gen-

erated in it that the heat radiating capacity of the anode bears to the heat generated in it. This is an approximate adjustment. Then there is a final self-corrective adjustment, so that if the electrode gets a little too full it evaporates faster and if it gets too low it will evaporate slower. Those two elements are the essentials of the invention. The cathode and the anode represent relatively the points where the current enters and leaves the lamp and are different in their action.

This self-corrective adjustment is obtained by the relation between this little column of mercury in the narrow tube and the cathode chamber. When the surface of the mercury is close to the cathode chamber, it is kept cool and does not evaporate rapidly. When it is far off, it is kept hot and it is evaporated rapidly, the idea or the crux being the relative size of the little extension of mercury and the main cathode. If the little extension is too large, it will cool off itself all the time. It would be impossible to get it hot enough to evaporate off an excessive amount of mercury.

The essential thing for the operation is the relative size of the intermediate tube and the cathode chamber. That is all there is to it. What may happen to be the size of the tube at the other end in relation to the anode has nothing to do with the action of the extension. It is all self-contained at the cathode and it is the relative size of that little tube and the main cathode that does the required work.

Mr. Thomas then called attention to the original drawing of the patent in suit, exhibit No. 2, and pointed out that no anode chamber was shown in the original drawing, and stated that the shape of the anode chamber selected for illustration in the drawing of the patent as allowed has no effect on the operation of the lamp and that any other form of anode chamber could have been selected for illustration. He also stated that an anode chamber connected by a narrow passage with the illuminating tube would make no difference in the operation of the lamp, providing the radiating capacity of the anode chamber was the proper amount.

After reviewing the claims of the patent in suit, Mr. Thomas repeated his statement that the essential feature of the lamp was confined to the cathode chamber, and that the features of construction of the anode chamber recited in claims 3 and 4 had no effect on the operation of the lamp and was not material to the claims. Mr. Thomas then stated that he carefully reviewed the original application of the patent in suit and was able to state as an expert that the original specification contained no suggestion of any definite relationship between the size of the tube connecting the illuminating tube with the cathode chamber, and the size of the tube connecting the illuminating tube and the anode chamber, and also that there was no suggestion in the original specification that the anode was to be partly filled with mercury and distinguished from entirely filled. The Bastian patents set up in the answer, No. 1,110,985 issued September 15, 1914, and No. 1,110,608, were discussed, these being divisional patents on the application involved in interference with the patent in suit when they were pending in the Patent Office.

Mr. Thomas' opinion was that while the lamps of the Bastian patents differed in shape from the lamp of the patent in suit, the difference in shape did not involve any difference in principle of operation or functions, and that both inventions obtained the same result in the same manner and by the same method.

Mr. Thomas next referred to patent No. 682,690 issued September 17, 1901, to Peter Cooper-Hewitt, and made reference particularly to Fig. 2, stating that the patent showed a cathode chamber and a narrow connecting tube partly filled with mercury, the narrow tube being introduced for the purpose of restraining the cathodic action referred to in the Bastian-Küch interference. The patent, he said, did not describe the same action as the Bastian or Küch patents but that the structure was very much the same.

Mr. Thomas concluded his deposition by stating that he had noticed that the claims refer to the relative size of the

illuminating tube and other parts of the lamp. That in his opinion the size of the illuminating tube is a matter that is determined by the size of the current to be introduced in the lamp, as a large current requires ordinarily a large tube and a small current a small tube. He called attention to patent No. 1,110,652, dated September 15, 1914, to Dr. Hewitt, wherein it was stated that the illuminating tube G is constructed with volatile electrodes G¹ and G² and is proportioned in size to the current to be used.

A comparison of the defendant's lamp and the lamps of the Bastian patents was made, the substance of the witness' conclusions being that there is no relationship between the diameter of the illuminating tube and the internal diameter of the portion of the tube which connects to the cathode chamber. The illuminating tube is proportioned to the size of the current it carries so that it does not get too hot and for other reasons, and the tube connected with the cathode is put there so that that little body of mercury shall be heat insulated so that it can be in close contact with the main body of the cathode or in rather remote contact, in which case it will get hot and evaporate down. The relation of the connecting tube is entirely with the cathode chamber, because that is the part from which it gets its support and with which it co-operates. The illuminating tube is purely a matter of current. If it is too small a tube it will get too hot and melt off. The defendant's lamp operates about three amperes, or a little over, while the Bastian lamp operated more nearly at one ampere, and there is a corresponding difference in the size of the illuminating tube. The size of the illuminating tube depends on the volume of current the lamp uses, and on anything else in regard to the action of the cathode maintaining a mercury level.

There was no cross-examination, and defendant rested.

The plaintiff called Dr. Ezekiel Weintraub as an expert in its behalf, Dr. Weintraub having previously stated his

qualifications in a companion case on patent No. 883,725 in the following language: "I have for the last fifteen years devoted a considerable part of my time to the study of the mercury vapor lamp art in all its forms. I have taken out a number of patents on inventions and have supervised the introduction of these lamps for the General Electric Company. I also got acquainted with the Kűch lamp in Europe, where I have been specially to study the manufacture of lamps by Heraeus. I have studied physics in Paris at the Sorbonne. I received a degree of Licencie. Afterwards I studied chemistry for four years in Zurich in Switzerland. I received a degree of technical chemical engineer. Then I offered a thesis for a doctor's degree at the University of Zurich, and for a number of years since then I was doing research work in different electrical lines for the General Electric Company and then became director of the research laboratory in Lynn, Massachusetts. For the last year I have been consulting engineer. I am not now in the employ of the General Electric Company but am only connected as consulting engineer. For a number of years almost exclusively, and for the last few years to a considerable extent, my research work included work on mercury vapor lamps."

Dr. Weintraub stated that he had heard Dr. Thomas' deposition and with some of the conclusions of Dr. Thomas he agreed and with others he did not. When asked to describe what he believed to be the true operation maintaining the balance in the mercury tube in view of his experience and research in that field, he said that he could add but very little to what has been said in the patent, and that Mr. Thomas also seemed to agree with the statements of the patent. He gave a brief explanation of the operation of the lamp, stating in substance that a narrow contraction at the cathode is necessary in those lamps of high vapor pressure to avoid any mercury on the walls of the tube. The pressure is so high that if additional mercury vapor is generated from a drop on the wall of the tube the lamp is liable to go out.

In a low pressure lamp with two mercury surfaces, that defect can not take place and a balance between the two electrodes is not necessary. It is merely necessary to place the cathode a little higher than the other. The anode always volatilizes more rapidly and the mercury therefore accumulates slowly in the cathode. When the cathode overflows a drop falls back and the balance is re-established. The drop falling back can not do any harm in the low pressure lamp, but in a high pressure lamp it will prevent stable operation of the lamp, because that drop will either put out the lamp or else interfere with its work. Küch was under the necessity in constructing his lamp to get automatic balance without the mercury flowing over, and to do this he provided the contraction of the cathode. As explained in the patent, the lamp starts with the mercury right at the end 3, which is essential. The construction is such that it must start at that point, after which the operation exactly as described in the patent takes place.

Dr. Weintraub then discussed the Bastian lamp disclosed in patent No. 1,110,985 which was granted as one division of the Bastian application in interference with the patent in suit. Dr. Weintraub stated in substance that the Bastian lamp was not a high pressure lamp, so that at first thought, it would appear unnecessary to have automatic balancing, as apparently the balance could be maintained by the dropping back of the mercury. The difficulty with that is that the Bastian lamp consists of a very narrow tube, so that the drop of the mercury, as it falls back, may completely fill the bore of the tube, and then break the arc in the lamp, so that practically the same trouble is met in the Bastian lamp as in the Küch lamp but for a different reason. In the Bastian lamp the problem is solved by enlarging the tube on both ends, which as stated is a very narrow tube. The theory of operation stated in the Bastian patents is very largely correct. Dr. Weintraub stated that he had operated Bastian lamps himself and from his observations he believed that the

patent did not state the real or main factor which caused that balance which the witness described as follows: The lamp starts with the mercury at C². As the mercury evaporates the arc is getting larger, shown by the level C³. The factors that Bastian indicates in his patent which now diminish evaporation are correct, but the main factor, in the opinion of the witness is that in getting the enlargement of the arc there is produced the effect of a little condensing chamber, so that the mercury that may evaporate condenses on the walls of this condensing chamber before it gets into the end of the tube. Comparing the Bastian lamp with the Küch construction, the witness said: "Küch has no tube enlarged at both ends, but a tube which is contracted. It is a structural difference adapted to his lamp to cause balance and much more efficient than the construction of Bastian. I have operated those Bastian lamps and have had balance at a certain definite current for which the lamp is built. If you change the current slightly one way or the other you get into trouble; the balance is no more. The Küch lamp can be much more varied or changed one way or the other. The difference in construction I see in these two lamps is that one has a tube enlarged and the other has a tube that is contracted."

There was no cross-examination, and both parties rested.

Approved January 8, 1917.

J. M. K.,

Judge.

(1) For the application of Rule 75, see *In re General Equity Rule 75*, 222 Fed. 884, 138 C. C. A. 574. Taken from the record in *General Electric Co. v. Cooper-Hewitt Co.*, 249 Fed. 61.

No. 2095.

Motion of Plaintiff for an Order to Omit Affidavit from Transcript with Objections.

[*Caption.*]

Comes now the plaintiff in the above entitled action and moves the court for an order directing the clerk of this

court to omit from the transcript of the record on appeal in this action, the George Mankle affidavit and exhibits attached thereto marked, filed May 26, 1916, for the reason that same are not material to the appeal and accordingly should not be incorporated into the record.

NEW YORK SCAFFOLDING COMPANY,
By A. & B., its Attorneys.

No. 2096.

**Objections of Plaintiff to Have Included in Transcript the
Affidavit Above.**

[*Caption.*]

Comes now the plaintiff in the above entitled action and makes this its objection to the Mankle affidavit and exhibits attached thereto marked, filed May 26, 1916, being included in the transcript of the record on appeal in this action because same are not material to the appeal and should not be incorporated into the record on appeal without an order of the court or a judge thereof and plaintiff offers to stipulate for an extension of the time to file record if same is necessary to procure an order of the court or a judge thereof in the premises.

NEW YORK SCAFFOLDING COMPANY,
By A. & B., its Attorneys.

No. 2097.

**Order Overruling Motion of Plaintiff to Omit Affidavit from
Transcript.**

[*Caption.*]

The motion of plaintiff herein for an order directing the clerk of this court to omit from the transcript on appeal, the affidavit and exhibits attached thereto, filed May 26, 1916, and the objection of the plaintiff herein to their inclusion in the transcript of the record on appeal, are hereby overruled to which the plaintiff excepts. The clerk will enter this order.

T. C. M.,
Judge.

No. 2098.**Prayer for Reversal.**

[*Caption.*]

To the Honorable the Supreme Court of the United States:

Now comes the above named plaintiff in error, and in connection with its writ of error issued by this court to the appellate division of the Supreme Court of the state of New York, third department, it prays for a reversal of the judgment against it of said appellate division affirming an award of the State Workmen's Compensation Commission, entered in the office of said court on March 2, 1915, and it also prays for a reversal of the judgment of affirmance entered in the office of said court on September 14, 1915, upon the order or judgment of the Court of Appeals, and for a reversal of the judgment of the Court of Appeals affirming said judgments or orders.

CHARLES C. BURLINGHAM,
Attorney for Southern Pacific Co.,
Plaintiff in Error.

No. 2099.**Notice of Motion to Affirm Decree Appealed from.**

In the United States Circuit Court of Appeals,
for the Seventh Circuit, October Term, A. D. 1913.

[*Caption.*]

To Taylor E. Brown, Charles E. Mehlope, and Charles C. Linthicum, Solicitors and of Counsel for Appellant:

Please take notice, that on Tuesday, the 6th day of October, A. D. 1914, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, we shall present to the honorable judges of the United States Circuit Court of Appeals for the Seventh Circuit, in the court room usually occupied by said court at Chicago, Illinois, a motion for the affirmance of the decree in the above entitled suit, dismissing

the bill of complaint therein for want of equity, and shall ask the order of said court granting the said motion or setting down the same for hearing and argument in conformity with the rules thereof. Copies of said motion and the grounds thereof, and the evidence in support of same and of the brief in support thereof, are herewith delivered, with the exception of the record of said Circuit Court of Appeals of the Sixth Circuit, in the suit of The Railroad Supply Company v. The Elyria Iron & Steel Company referred to in said motion and in the affidavit of Frank F. Reed in support thereof. Copies of said record and the exhibits therein are in your possession. The said copy of the said record referred to in said affidavit of Frank F. Reed is retained in his possession, subject to your examination at reasonable times, and will be presented with said motion, at which said time and place you may appear, if you see fit.

Dated, Chicago, Illinois, September 25, A. D. 1914.

FRANK F. REED &
EDWARD S. ROGERS,

Solicitors and of Counsel for Appellees.

Received a copy of the above notice and of the documents specified therein, this 26th day of September, A. D. 1914.

T., M. & R.,
Solicitors and Counsel for Appellees.

No. 2100.

Motion to Affirm, and Reasons Stated, as Res Adjudicata.
In the United States Circuit Court of Appeals,
for the Seventh Circuit, October Term, A. D. 1913.

[*Caption.*]

And now come the said appellees, The Hart Steel Company and Guilford S. Wood, and move the court in the above entitled suit for an affirmance of the decree of the United States Circuit Court for the Northern District of Illinois, Eastern

Division, dismissing the said bill of complaint for want of equity, basing said motion upon the following grounds:

1. That the said suit and the issues therein have become and are as to the said parties thereto, and each and all of them, *res adjudicata*, by reason of the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the proceeding recently therein finally determined and adjudicated, wherein The Railroad Supply Company was appellant and The Elyria Iron & Steel Company was appellee and wherein the parties respectively were in privity with the parties herein and the subject matter, issues and evidence identical.

2. For the reason that this suit and proceedings and the issues and proceedings therein have become and are finally and completely adjudicated by reason of the decision and decree of the United States Circuit Court of Appeals for the Sixth Circuit, entered on the 7th day of April, A. D. 1914, and since and now in full force and effect, wholly unmodified and not appealed from wherein the parties are in privity with the parties herein and the issues and evidence identical.

3. For the reason that each and all of the issues in this suit have been fully and finally adjudicated and determined by the United States Circuit Court of Appeals for the Sixth Circuit by its decree entered in the suit recently pending in said court, wherein The Railroad Supply Company, appellant herein, was appellant, and The Elyria Iron & Steel Company was appellee, and in which the said Elyria Iron & Steel Company was in privity to and with the Hart Steel Company and Guilford S. Wood, in and by which said decision and decree of the United States Circuit Court of Appeals for the Sixth Circuit, all matters in controversy herein *was* finally determined and adjudicated.

4. For the reason that all matters at issue and in controversy in this proceeding have been fully and finally determined by the United States Circuit Court of Appeals for the Sixth Circuit, in its decree entered on the 7th day of April,

A. D. 1914, in the suit of The Railroad Supply Company, appellant, against Elyria Iron & Steel Company, appellee, in which said suit and proceeding the said The Railroad Supply Company, appellant, was The Railroad Supply Company, appellant herein, and The Elyria Iron & Steel Company, appellee, was in privity with the Hart Steel Company and Guilford S. Wood, appellees herein, and in which said suit and proceedings in said Circuit Court of Appeals for the Sixth Circuit, the pleadings, issues, evidence, exhibits and arguments are identical with the pleadings, issues, evidence, exhibits and arguments herein.

Said motion is based upon a certified copy of the decree of said Circuit Court of Appeals of the Sixth Circuit in said suit, wherein The Railroad Supply Company was appellant and the Elyria Iron & Steel Company was appellee, affirming the order of the District Court for the Northern District of Ohio, Eastern Division, dismissing the bill of complaint therein for want of equity, and of the opinion of said Circuit Court of Appeals filed therewith, which said decree is dated April 7, 1914, and the order and decree of said United States Circuit Court of Appeals of the Sixth Circuit in said last named suit and proceeding, dated June 30, 1914, denying the petition for rehearing filed therein; (2) The record in this proceeding, particular parts of which are specifically designated and attached hereo; (3) A certified copy, under the seal of the Circuit Court of Appeals of the Sixth Circuit, of a portion of the record thereof from the deposition of Henry S. Hawley identical with a portion of the deposition of said Hawley on pages 69 and 70 of the record herein, herewith specifically designated in connection with this motion; (4) The affidavit of Frank F. Reed, solicitor for appellees; (5) A certified copy of the decree of the United States District Court for the Northern District, Eastern Division, in said suit of The Railroad Supply — v. The Elyria Iron & Steel Company, dated March 4, 1912, dismissing the bill of complaint and of the order of said last

named court allowing the filing of the mandate in said suit from the Circuit Court of Appeals for the Sixth Circuit affirming the said last named decree; (5) A copy of the record of said suit in the United States Circuit Court of Appeals for the Sixth Circuit, wherein said The Railroad Supply Company was appellant and The Elyria Iron & Steel Company was appellee with the filing stamp of the clerk of court thereon.

Wherefore, said appellees ask the order and decree of this court affirming the order and decree of said Circuit Court of the United States for the Northern District of Illinois, Eastern Division, dismissing said bill of complaint for want of equity.

Dated, September 22, A. D. 1914.

FRANK F. REED &
EDWARD S. ROGERS,
Solicitors for Appellees.
FREDERICK P. FISH,
Of Counsel for Appellees.

No. 2101.

Affidavit in Support of Motion Above.

[Caption.]

State of Illinois,
County of Cook, ss.:

Frank F. Reed, being duly sworn, deposes and states that he is the solicitor for appellees, The Hart Steel Company and Guilford S. Wood, in the above entitled suit and has conducted the defense of said suit from the date of the institution thereof.

That on the 9th day of December, 1908, a suit in equity was instituted by The Railroad Supply Company against the Elyria Iron & Steel Company, in the then United States

Circuit Court for the Northern District of Ohio, Eastern Division. That the suit proceeded to final decree on the 4th day of March, A. D. 1912, whereby it was ordered, adjudged and decreed that said suit be dismissed for want of equity, at complainant's costs. That thereupon an appeal was prosecuted by complainant therein to the United States Circuit Court of Appeals for the Sixth Circuit, and that on the 7th day of April, A. D. 1914, the said Circuit Court of Appeals entered a decree affirming the decree of the said United States District (then Circuit) Court for said Northern District of Ohio, Eastern Division, and subsequently, on the 30th day of June, 1914, entered a further order denying the petition for rehearing in said proceeding. Whereupon in due course a mandate was issued in said last named proceeding and filed in said United States District Court for the Northern District of Ohio, Eastern Division, copies of which decrees and orders are filed herewith.

That said Circuit Court of Appeals for the Sixth Circuit rendered an opinion in said suit, a certified copy of which is filed herewith; that the pleadings, stipulations, evidence and exhibits in said suit instituted in said Northern District of Ohio, Eastern Division, and appealed to and determined by the United States Circuit Court of Appeals for the Sixth Circuit, were in all respects, except the names of the defendants, and the opinions, title of suit and forms of decrees and orders therein, identical with or duplicates of the pleadings, stipulations, evidence and exhibits in this proceeding; and that in some instances where duplicates of the exhibits were not obtainable, the identical exhibits were by stipulation of the parties used in both cases. The only differences between the two records consists in the substitution of the name of the Elyria Iron & Steel Company as defendant for the names of Hart Steel Company and Guilford S. Wood as defendants, the use of the term "defendant" in the singular instead of in the plural as in this case; the title of the suit, the forms of the orders and decrees in said proceeding and

the opinions filed therein respectively by the two courts. A copy of the opinion filed in said proceeding in the United States Circuit Court for the Northern District of Ohio, Eastern Division, is annexed to the brief for appellees in this proceeding.

Affiant files herewith and refers to a printed copy of the record showing the pleadings, proceedings and evidence in said suit in the United States Circuit Court for the Northern District of Ohio, Eastern Division, and in said Circuit Court of Appeals for the Sixth Circuit, bearing the file mark of the clerk, and used as the record in said proceeding.

[*Acknowledgment.*]

FRANK F. REED.

THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL JURISDICTION.*

No. 2102.

Bill by Foreign Consul (1) against a Citizen of the United States.

In the Supreme Court of the United States.

A. B., Plaintiff,

vs.

C. D., Defendant.

A. B., a resident of the city of —, in the state of —, but an alien, and a consul of the republic of France for the city of —, duly appointed and accredited by the government of the republic of France, and duly recognized as such by the government of the United States of America, brings this his bill against C. D., of —, in the state of —, who is a citizen of that state. Thereupon your orator complains and says: [*Set forth the cause of action.*]

* For appellate forms in Supreme Court see Appellate Proceedings, page —.

(1) The Supreme Court has original jurisdiction "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party." Constitution of United States, Art. 3, Sec. 2; Judicial Code, Sec. 233, 36 Stat. L. 1156; Cooley's Const. Law, p. 112, and Gould & Tucker's Notes to the Revised Statutes, p. 136; Vpl. II, Federal Statutes, Annotated, 2nd Ed., pp. 154 to 162.

On the nature and extent of the original jurisdiction of the Supreme Court of the United States, the following cases are classic:

Marbury v. Madison, 1 Cr. 137; *U. S. v. Yale Todd*, 13 How., note at p. 52; *Hayburn's Case*, 2 Dall. 409; *U. S. v. Ferreira*, 13 How. 40.

And see the discussion by Justice Day in *Muskrat v. U. S.*, 219 U. S. 346, to the effect that the court can not sit to decide the question of constitutionality per se, but only in a case where rights are in controversy, and that question arises as fixing the measure of right or recovery.

Further, in *B. & O. Ry. v. Interstate Commerce Commission*, 215 U. S. 216, it was held that a circuit court of the United States can not certify the whole case to the United States Supreme Court under a statute providing for certifying questions of law, since such proceeding would be bestowing original jurisdiction on the Supreme Court. And in *Ex parte Vallandigham*, 1 Wall. 243, 252, it is said that the original jurisdiction of the Supreme Court as expressed in the Constitution can not be enlarged by Congress.

In *U. S. v. Texas*, 143 U. S. 621, the court held that it had original jurisdiction at the suit of the United States to determine the boundary between a state and one of the territories, and in that case the whole ground of original jurisdiction is well gone over.

But there is no original jurisdiction of a suit by a state against the United States without the consent to be sued. *Kansas v. U. S.*, 204 U. S. 331.

A state can not maintain an original action in the U. S. Supreme Court to enforce its criminal laws against a citizen of another state. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

There is no original jurisdiction in the U. S. Supreme Court of a suit between a state and citizens thereof and citizens of another state joined as defendants. *Calif. v. Sou. Pac. Co.*, 157 U. S. 229.

As to suits involving representatives of foreign governments, see *Davis v. Packard*, 7 Pet. 276; *Gittings v. Crawford*, Fed. Cas. 5465 (Taney, 1); *In re Baiz*, 135 U. S. 403; *Pooley v. Luco*, 76 Fed. 146; *Bors v. Preston*, 111 U. S. 252; *Ames v. Kansas*, 111 U. S. 449, 469.

As to proceedings in the Supreme Court in a case where a state is a party, see *Grayson v. Virginia*, 3 Dall. 320; *R. Id. v. Mass.*, 14 Pet. 210, 257; and the highly interesting suit of *Virginia v. West Virginia*, elsewhere cited, especially 246 U. S. 565.

No. 2103.**Motion for Leave to File Bill of Complaint (1).**

The Supreme Court of the United States

October Term —.

State of —,

vs.

State of —.

Now comes the plaintiff by R. X., Esq., attorney general of said state and moves the court for leave to file the accompanying bill of complaint.

R. X.,

Attorney General of the State of —.

(1) It is the usual practice in equity cases to hear an application for leave to file *ex parte*. *Washington vs. Northern Securities*, 185 U. S. 254, where the cases are reviewed on this point. The rule seems to be that the motion will be granted as a matter of course unless the court is satisfied that the matter is plainly beyond its jurisdiction when leave to file will be denied. See *Minnesota vs. Northern Securities*, 184 U. S. 199.

No. 2104.**Bill by One State Against Another to Settle the Boundary.(1)**

In the Supreme Court of the United States.

[*Caption.*]

The state of Missouri, by Robert A. Hatcher, her agent and attorney, duly appointed and commissioned in pursuance

(1) In *Chisholm v. Georgia* (2 Dall. 419), the Supreme Court entertained an action in assumpsit against a state; and in *U. S. v. North Carolina*, 136 U. S. 211, an action of debt. In *Georgia v. Brailsford*, 3 Dall. 1, a jury was empaneled in the Supreme Court to determine the right of the state of Georgia, under the Confiscation Act of May 4, 1782, to a debt due by a citizen of Georgia to a partnership composed of certain persons, some of whom were citizens of South Carolina and one of whom was a British subject.

There is nothing to prevent the Supreme Court from entertaining common law cases by one state against another. See *U. S. v. Texas*, 143 U. S. 627. But in fact most of the suits within the original jurisdiction of the Supreme Court of the United States have been commenced by bill in equity.

of law, states that a controversy has arisen between said state and the state of Kentucky, respecting the boundaries of said states, and the said state of Missouri complains that said state of Kentucky, since the first of January, 1857, has unlawfully claimed, and exercised jurisdiction over Wolf Island, an island in the Mississippi river, forming part of the territory of said state of Missouri; that said states are severally bounded at the point in question by the main channel of said river, and the island was, at the time said boundaries were fixed, and still is, on the western, or Missouri, side of the said channel.

Wherefore plaintiff prays that said state of Kentucky may be made a defendant to this bill, and permitted to answer the same; that upon a final hearing of said cause, the boundary herein claimed may be ascertained and established by the decree of this court, and that the rights of possession, jurisdiction, and sovereignty of said state of Missouri thereto be quieted, and the defendant forever enjoined and restrained from disturbing said plaintiff, her officers, or people in the full possession and enjoyment of the same; and the plaintiff prays such other and further relief as the nature of the case requires, and to equity belongs; and plaintiff will ever pray, etc.

R. Y.,

Agent and Solicitor for Plaintiff.

(1) The Supreme Court has original jurisdiction in cases in which a state is a party. See Constitution of the United States, Art. III, Sec. 2; Judicial Code, Secs. 233 and 256; Gould & Tucker's Notes to the Revised Statutes, p. 136; Cooley's Const. Law, p. 112.

The general nature of proceedings in the Supreme Court of the United States respecting original suits in equity is thus stated in *California v. Southern Pac. R. Co.*, 157 U. S. 259.

"It has been determined that the court will frame its proceedings according to those which have been adopted in the English courts in analogous cases, and that the rules of the Court of Chancery should govern in conducting the case to a final issue; although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice."

No. 2105.**Bill for the Settlement of a Boundary Between States**

(1). (Another Form).

[Caption].

To the Judges of the Supreme Court of the United States.

The State of Rhode Island, one of the United States of America, brings this bill against the State of Massachusetts, also one of the United States of America.

And thereupon your orator complains and says that on the third day of November, 1621, King James the First granted a charter to the council of Plymouth, for planting, ruling, ordering, and governing New England, in America, in which were described the boundaries of the territory so granted, as follows: [*here describe the boundaries*].

That afterwards, to wit, on the fourth day of March, 1629, King Charles the First incorporated by letters patent "The Governor and Company of Massachusetts Bay, in New England," and the council at Plymouth conveyed to them by deed the lands above described.

Copies of said charters and deed are hereto annexed, marked A, B, C, respectively, and your orator prays that they may be made a part hereof, as your orator will be prepared and prove the same.

Your orator further states that afterwards, on the eighth day of July, 1763, King Charles the Second, by letter patent, granted a charter of incorporation to William Brenton, John Coddington, and others, by the name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America," and granted and conferred to the corporation, by letters patent, all that part of New England, in America, containing, etc., bounded on the north or northerly by the aforesaid south or southerly line of Massachusetts colony or plantation, etc.

Your orator further states that the province and colony of Massachusetts Bay, and of Rhode Island and Providence Plantations, thus established, continue under the charts and

letters patent aforesaid, with the boundary line between them as aforesaid, unchanged until the fourth day of July, 1776, when, with their sister colonies, they became independent states of the Union.

Your orator further states that the true boundary line between the State of Rhode Island and Providence Plantations, and the Commonwealth of Massachusetts, by virtue of the charters aforesaid from the English Crown, is a line run east and west three miles south of Charles river, or any or every part thereof.

Your orator further states that the Commonwealth of Massachusetts holds possession to a line eight miles south of Charles river, or any part thereof, and one that does not run east and west, but south of a west and north of a northeast course; that the territory between this line and the one above described belongs to the State of Rhode Island, and that the defendant unjustly withholds the possession thereof from her and exercises acts of sovereignty over it.

Your orator further states that in consequence of various disputes and controversies about the boundary between the two colonies, and subsequently between said states, numerous efforts were made to adjust the same; that about the year —, commissioners were appointed by the legislatures of said colonies respectively for the purpose of ascertaining and settling said boundary, but they were never able to agree upon or settle the same.

Your orator further states that the defendant herein claims that the boundary line was settled and adjusted by said commissioners acting for the two colonies and under the authority of the colonies respectively, and that this settlement has been acquiesced in by the plaintiff. But your orator states that there were errors in the proceedings of the said commissioners; that they were misinformed and mistaken as to a monument alleged to have been set up long anterior to the appointment of said commissioners, by Nathaniel Woodward and Solomon Caffrey, and which they fixed upon and assumed

to be on the boundary line three miles south of any part of Charles river, without any actual survey or measurements, etc.; that the line thus fixed upon was in fact eight miles south of any part of Charles river, and has always been objected to and resisted by the plaintiff, and never acquiesced in as the true boundary line between said states; that the agreement of the said commissioners was not accepted or ratified by the plaintiff; that no stake or monument existed on said line as assumed by said commissioners; and that she never admitted any line as the true boundary, except the one called for by the charters aforesaid.

Wherefore the complainant prays that the said defendant may be required to answer the matters set forth in this bill; that the northern boundary line between the plaintiff and the state of Massachusetts may, by the order and decree of this honorable court, be ascertained and established; that possession and rights of jurisdiction and sovereignty to the whole tract of land, with the appurtenances mentioned, described, and granted in and by the said charter or letters-patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north by an east and west line drawn three miles south of the waters of said Charles river or of any and every part thereof, may be restored and confirmed to the plaintiff; that the plaintiff may be quieted in the full and free enjoyment of her possession, jurisdiction, and sovereignty over the same, and the title, possession, jurisdiction, and sovereignty of Rhode Island and Providence Plantations over the same be confirmed and established by the decree of this court; and that the plaintiff may have such other and further relief in the premises as to the court shall seem meet and consistent with equity and good conscience.

May it please your honors to grant unto your orator a writ of subpœna under the seal of this honorable court, directed to the governor and attorney-general of the state of Massachusetts, commanding them, on a day certain to be named

and under a certain penalty, to be and appear in this honorable court, then and there to answer, on behalf of said state, all and singular the premises, and on behalf of said state stand to perform and abide such further order, direction, and decree as may be made against said state.

And your orator will ever pray, etc.

R. X.,

Solicitor for Plaintiff.

S. X., of Counsel.

(1) See note to No. 2104.

No. 2106.

Bill by one State against Another to settle Boundary (Another Form).

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Plaintiff states that it is one of the union of states constituting and forming the United States of America; that by act of Congress approved March 6, 1820, it was admitted into the union of states upon an equal footing with the original states in all respects whatsoever; that it is provided by the act of admission that said state shall consist of all territory included within the following boundaries, to wit:

"Beginning in the middle of the Mississippi river, on the parallel of thirty-six degrees north latitude; thence west along that parallel of latitude to the San Francois river; thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas river, where the same empties into the Missouri river; thence from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said

parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into Mississippi river; thence due east to the middle of the main channel of the Mississippi river; thence down and following the course of the Mississippi river, in the middle of the main channel thereof, to the place of beginning : *Provided*, That said state shall ratify the boundaries aforesaid : (a) *And provided also*, That the said state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state, so far as the said river shall form a common boundary to the said state and any other state or states, now or hereafter to be formed and bounded by the same—such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading to the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost, or toll therefor imposed by the said state."

Plaintiff further states that by an act of the Senate and House of Representatives of the United States of America in Congress assembled the boundary line of said state was to a certain extent changed in this, to wit, that all that part of a strip of territory lying between the Missouri river and west of a meridian line passing through the middle of the mouth of the Kansas river where the same empties into the Missouri river, thence north along said meridian line to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, as provided for by said act as follows :

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the Indian title to all the lands lying between the state of Missouri and the Missouri river shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the state of Missouri, and the western boundary of said state shall be then

extended to the Missouri river, reserving to the United States the original right of soil in said lands and of disposing of the same: *Provided*, That this act shall not take effect until the President shall, by proclamation, declare that the Indian title to said lands has been extinguished; nor shall it take effect until the state of Missouri shall have assented to the provisions of this act."

The plaintiff further states that after the enactment of the aforementioned act by Congress, the President of the United States, by proclamation, declared that the Indian title of said lands had been extinguished, and the state of Missouri, after the passage thereof, duly and legally assented to the provisions of said act.

The plaintiff states that in February, 1831, the state of Missouri, by act of its legislature, petitioned the Congress of the United States to alter and extend its boundary line so as to include all that tract of land lying on the north side of the Missouri river and west of the then boundary line, so that the same shall be bounded on the south by the middle of the main channel of the Missouri river and on the north by the then present northern boundary line when the same is continued in a right line to the west to the middle of the main channel of the Missouri river; the above tract of land having been previously held by the Kansas, Iowas, Sac, Foxes, and other Indian tribes, but which had been at the time of the request of the plaintiff herein to the Congress of the United States for annexation duly and legally ceded by said Indian tribes to the government of the United States by treaty known as the treaty of Prairie du Chien.

The object of this plaintiff in its memorial to the Congress of the United States for the addition of said territory, which was a strip of land about one hundred miles long, running north from the mouth of the Kansas river to the north line of the state and east of the main channel of the Missouri river, was that as the Missouri was the only great highway of that region of the state and could not be reached by a country in-

habited by Indians, and being without roads, a cession to this plaintiff was necessary and proper. By the act of June 7, 1836, the request of the state of Missouri was granted and it was ceded all jurisdiction over the lands lying between its then western line and the Missouri river, making said river its western boundary.

Plaintiff further states that the defendant, the state of Nebraska, is a member of the union of states constituting and forming the United States of America; that it was admitted into the union by an act of the Senate and House of Representatives of the United States of America in Congress assembled, and approved on the 19th day of April, 1864; that said act of admission into the union provides the following boundaries for said state, to wit: "Commencing at a point formed by the intersection of the western boundary of the state of Missouri with the fortieth degree north latitude; extending thence due west along said fortieth degree north latitude to a point formed by its intersection with the 25th degree of longitude west from Washington; thence north along said twenty-fifth degree of longitude to a point formed by its intersection with the forty-first of north latitude; thence west along said forty-first degree of north latitude to a point formed by its intersection with the 27th degree of longitude west from Washington; thence north along said 27th degree of west longitude to a point formed by its intersection with the forty-third north latitude; thence east along said forty-third degree north latitude to the Reya Paha river; thence down the middle of the channel of said river, with its meanderings to its junction with the Niobrara river; thence down the middle of the channel of said river following the meanderings thereof, to its junction with the Missouri; thence down the middle of the channel of said Missouri river, and following the meanderings thereof to the place of beginning."

Plaintiff further states that by the act of Congress admitting the state of Nebraska into the union of states and the act of Congress approved June 7, 1836, extending the jurisdiction and territory of the state of Missouri, the boundary line be-

tween said states, the plaintiff and defendant, is the middle of the channel of the Missouri river, following the meanderings thereof.

Plaintiff further states that at the time of admission of plaintiff and defendant into the union the land bordering on each side of the Missouri river was wild, swampy, uninhabited, and uncultivated; that it contained a large number of sloughs, marshes, and was at nearly all times of the year covered with water, which rendered it totally useless for agricultural and other useful purposes. At said time and for a long time thereafter the channel of said river was continually changing from place to place, caused at times by the force of accretions and deposits along the banks thereof and by a constant carrying away of the opposite bank or by a sudden change during times of high water, when the land upon each side of said river for several miles was totally submerged and overflowed.

Plaintiff further states that the counties of Atchison, Missouri, and Nemaha, Nebraska, are situated on opposite sides of the said Missouri river; that in the spring and summer of 1867 the current or main channel of said river assumed a permanent course along its west bluff or along the bluff in the state of Nebraska, leaving a large body of land, to wit, about 16,000 acres, to the east thereof on the Missouri side, which said land is situated south and west of the water's edge of said Missouri river at the time of the admission of plaintiff and defendant into the union, commencing at a point on the Iowa line between the states of Missouri and Iowa, about the middle of the north line of the northeast quarter of section 34, township 67, range 43, west of the fifth principal meridian, running in a meandering course, south and east, through the west half of section 35, the north half and east half of section 2, the southwest quarter of section 1, the north half of section 12, to the range line; thence south in its meanderings along said range lines between ranges 42 and 43 to the southwest corner of section 18, township 66, range 42; thence easterly and northerly across the southwest quarter of said section 18 and the east half of said

section 18; thence north in its meanderings across the east half of section 7 and the southeast quarter of section 6; thence eastward in its meanderings and slightly to the north across the north half of section 5; thence south and east across the north and east half of section 4; thence south on the section line between sections 9 and 10 to about the center of the west line of the northwest quarter of section 10; thence southeasterly across said north quarter section and the southwest quarter of section 10; thence south across the west half of section 15, township 66, range 42; thence southwesterly across the west half of section 22, meandering westerly into the southeast quarter of section 21; thence southwesterly across said southeast quarter section into and across the northwest quarter of section 28, the northeast quarter of section 29, the southwest quarter of section 29, into and across, in a southwesterly direction, the southwest quarter of section 30, where it strikes the present low-water edge of said Missouri river at a point on the south line of said section 30, township 66, range 42, Atchison county, Missouri, all of which is shown by "Exhibit A," filed herewith.

Plaintiff further states that on account of the peculiar condition of the land bordering upon each side of the river between the counties of Atchison, Missouri, and Nemaha county, Nebraska, at the time of the admission of the plaintiff and defendant into the union and for a long time thereafter, and on account of the uncertain, peculiar, and changeable disposition of said river and its main channel, the exact boundary line between said states was not permanently fixed and in no condition to be fixed and determined under and according to the acts of admission of this plaintiff and this defendant into the union until said river assumed its present main channel and course in the spring and summer of 1867.

That since said river has assumed its present course the channel between the counties of Atchison, Missouri, and Nemaha, Nebraska, in the spring and summer of 1867, the land on the Missouri side, in the Missouri bottom, and in Atchison county, Missouri, has, by constant draining and filling up, become sub-

ject to a high state of cultivation and is now inhabited by a large number of persons.

Plaintiff further states that on account of the channel of the Missouri river assuming its present course and position the inhabitants, residents, and land-owners on the Missouri side of said river are at a loss to know whether they belong to and are under the jurisdiction of the state of Nebraska, the defendant herein, or the jurisdiction of the state of Missouri, the plaintiff herein.

Plaintiff further states that it is entitled to jurisdiction over all the land hereinbefore described east and north of said river in Atchison county, and that said territory belongs to it under and by virtue of the act of the Congress of the United States approved June 7, 1836, extending its jurisdiction and boundary line as aforesaid, and that said territory so described legally and properly belongs to this plaintiff.

Plaintiff further states that the defendant herein, the state of Nebraska, claims jurisdiction over said land or a part thereof, the exact amount of which this plaintiff has no sufficient knowledge upon which to form a belief, and that said defendant claims said land by virtue of the act of Congress admitting it into the union of states.

Plaintiff further states that it is highly important to the states of Missouri and Nebraska that the question of boundary be speedily and finally settled; that heretofore the peace of the people of the states of Missouri and Nebraska, and especially in the county of Atchison, Missouri and Nemaha, Nebraska, have been seriously disturbed in consequence of frequent conflicts of jurisdiction arising from differences of opinion as to the location of the state line between said counties.

Plaintiff further states that the controversy herein involves question of jurisdiction and sovereignty, and that the state of Missouri has no adequate relief at law.

Wherefore this plaintiff prays that the state of Nebraska be required to answer the matters and the things herein set forth, and that upon a final hearing the boundary between this

plaintiff, the state of Missouri, and the state of Nebraska be by order and decree of this court ascertained and established; that the right of possession, jurisdiction, and sovereignty of the state of Missouri to all the territory east and north of the center of the main channel of the Missouri river running between this plaintiff and this defendant at the present time be restored to the state of Missouri, and that this plaintiff be quieted in her title thereto, and that the defendant, the state of Nebraska, be forever enjoined and restrained from disturbing said state of Missouri in the full enjoyment and possession of said land and territory, and that such other and further relief may be granted as the nature of the case may require.

The State of Missouri,
By Lon V. Stephens, Governor.

Edward C. Crow,
Attorney General of Missouri.

(1) Taken from the record in *Missouri v. Nebraska*, 196 U. S. 23, decree in 197 U. S. 577.

No. 2107.

Bill by a State to Enjoin an Unlawful Combination or Trust.

To the Judges of the Supreme Court of the United States of America.

Your oratrix, the state of Washington, Complainant, by W. B. Stratton, Attorney General, brings this its bill of complaint against the Northern Securities Company, a Corporation, the Great Northern Railway Company, a Corporation, and the Northern Pacific Railway Company, a Corporation, and alleges: .

First. That by an act of Congress entitled "An Act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with "

original states, and to make donations of public lands to such states," approved February 22nd, 1889, the said state of Washington was admitted into the union upon an equal footing with the original states.

Second. That said Northern Securities Company is a corporation organized as hereinafter alleged, under and by virtue of the laws of the state of New Jersey, and is a citizen thereof.

That the Northern Pacific Railway Company is a corporation organized and existing as hereinafter alleged, under and by virtue of the laws of the state of Wisconsin, and is a citizen thereof.

That the Northern Pacific Railway Company is a corporation organized and existing as hereinafter alleged, under and by virtue of the laws of the state of Wisconsin, and is a citizen thereof.

Third. (a) That by the said Act of Congress of February 22nd, 1889, and by various other acts of Congress, the United States donated to the state of Washington from the public domain, large quantities of land situated within said state and of the value of several millions of dollars; that said state has now left and undisposed of more than two million acres of said lands of the value of more than forty million dollars (\$40,000,000), much of which said land is located in the territory traversed by the railroads of the Great Northern and Northern Pacific Railway Companies, as hereinafter alleged; that the value of said land and the salability thereof depends in very large measure upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway Companies.

That many of said lands are vacant and unsettled, and located in regions not at present reached by railway lines and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of the said Great Northern and Northern Pacific Railway Companies, respectively, to

extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies for existing as well as new business; that under the consolidation and unity of control hereinafter set forth, such rivalry will cease and many of the lands now owned by the state of Washington will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the produce raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of said state, and that said lands can not be sold or the income of said state increased thereby without the construction of railroad lines to, or adjacent to, the same.

(b) That the state of Washington is now, and for many years past has been, the owner of and continuously maintained within its limits an educational institution for the benefit of its citizens, known as the university of Washington; also two hospitals for the insane within its territorial limits; also three normal schools for the education of teachers within its territorial limits; also a state penitentiary located at Walla Walla within said state; also a school for defective youth located at Vancouver in said state; also a reform school located at Chehalis in said state; also a soldiers' home located at Orting within said state.

That for many years past the state of Washington has continuously maintained and supported each of said institutions, and in the care, maintenance and management thereof has been compelled to and in the future, of necessity, will annually purchase large quantities of supplies for said institutions, including provisions, clothing and fuel, a great portion of which the said

state of Washington is compelled to ship over the different lines of railway owned and operated by the Great Northern Railway Company and the Northern Pacific Railway Company, and will annually pay to each of said Railway Companies large sums of money for the transportation over said lines of railway, of persons taken to the various institutions above named.

That the state of Washington is compelled to expend annually more than five hundred thousand dollars (\$500,000) in the operation and maintenance of said public institutions, most of which sum is raised by general taxation upon the lands and other property of the citizens of said state and situated therein; that the amount of taxes, which said state can collect and the successful maintenance of its said public institutions, as well as the performance of its governmental functions or affairs, depends largely upon the value of the real and personal property situated within its territorial limits and the general prosperity and business success of its citizens; that the value of said real and personal property of the citizens of said state, as well as their business success and general prosperity, depend very largely upon maintaining in said state, free, open and unrestricted competition between the railway lines of the Great Northern and Northern Pacific Railway Companies respectively, within said state.

Fourth. Your oratrix further alleges, that immense quantities of wheat and other products are shipped annually from Spokane and other competitive points within the state of Washington, and all on the lines of railway of the Great Northern and Northern Pacific Railway Companies, hereinafter referred to, to the cities of Seattle, Everett, Snohomish, Whatcom, Fairhaven, Sumas, Blaine and other cities along the lines of said railways within said state; that enormous quantities of merchandise, timber and other products have been, and will continue to be, shipped annually over said lines of railway between the cities of Spokane, Seattle, Everett, Snohomish, Whatcom, Fairhaven, Sumas, Blaine and various other cities and villages along said lines of railway situated within said state, and which

are purchased and used annually by the people thereof; that the residents of said state annually ship hundreds of millions of feet of lumber and large amounts of shingles, fruit and other commodities over each of said lines of railway from points in said state to points along the lines of said railway companies in the states of Idaho, Montana, the Dakotas and Minnesota; that a large amount of such products are ultimately consigned from points in the state of Washington to divers cities situated in the eastern states of the United States, over lines of railway connecting with said Great Northern and Northern Pacific lines of railway; that the competition in both freight and passenger traffic to and from said places has always been sharp and active between said railway companies, and has secured to residents of the state of Washington, and to the state of Washington itself, much lower rates for both freight and passengers than would otherwise have been obtained or than will and can be obtained in case the consolidation or unity of control and management of the Great Northern and Northern Pacific Railway Companies, hereinafter alleged, is not enjoined as herein prayed.

Fifth. That the Great Northern Railway Company is a corporation organized and existing under and by virtue of the laws of the state of Minnesota, to wit: Under an act duly passed by the territory of Minnesota, entitled, "An Act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March first, A. D. 1856, and various subsequent acts of the legislature of the state of Minnesota amendatory thereof and supplemental thereto; that on the 16th day of September, A. D. 1889, the corporate name of said company, originally being the Minneapolis & St. Cloud Railroad Company, was duly changed to the Great Northern Railway Company; that during the year 1889, said railway company caused to be constructed a line of railway situated in Minnesota, extending from St. Cloud to Hinckley, a distance of approximately eighty-five (85) miles, and immediately conveyed the same to the St. Paul, Minneapolis & Manitoba Railway Company, a

corporation also organized under and by virtue of the laws of the state of Minnesota, hereinafter referred to as the Manitoba Company; that said Manitoba Company, prior to the 1st day of February, 1890, built, purchased and put in operation various lines of railway within the state of Minnesota, as well as the states of North Dakota, Montana, Idaho and Washington, connecting by rail the cities of Seattle, Spokane and various cities and villages within said state of Washington with each other, and with the cities of St. Paul and Minneapolis in the state of Minnesota, and divers other cities and villages along the lines of said railway companies between Seattle in the state of Washington, and St. Paul and Minneapolis in the state of Minnesota; that on the 1st day of February, A. D. 1890, said Manitoba Railway Company leased to the Great Northern Railway Company for a period of nine hundred and ninety-nine (999) years, all of the lines of railway, including the rolling stock then owed and controlled by said Manitoba Company; that since said date the Great Northern Railway Company has continued to and does now, control, operate and maintain each and all of said lines as one complete railroad system and thereby became and continued to be a corporation subject to the laws, regulations and provisions of the said state of Washington relating to railway or railroad corporations, including those provisions of the constitution of said state hereinafter specifically pleaded or referred to; that since said date the Great Northern Railway Company has constructed divers subsidiary lines of railway running to divers villages and cities in the states last above named connecting the same with the main line of said railway, hereinbefore described, and as a part of its system of railways has, since the date last aforesaid, constructed divers lines of railway running in an easterly and southeasterly direction across the state of Minnesota, and now owns all of the capital stock of the Eastern Minnesota Railway Company, a corporation organized under the laws of the state of Minnesota and which owns and operates a line of railway extending from the cities of St. Paul

and Minneapolis to Duluth, in the said state, and by virtue of the ownership of such stock, dictates the policy of said railway company, controls its line of railway, and actually operates the same as a part of the Great Northern system; that all of said railways and railway lines are operated and controlled by and form a complete system under the name of the Great Northern Railway Company.

That the charter of said Great Northern Railway Company provides as follows: "That all of the affairs and business of said company shall be conducted by or under the direction of a board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things necessary to be done and not inconsistent with the constitution and laws of the United States or the laws of this territory, or this act."

Your oratrix further alleges that the board of directors of said Great Northern Railway Company, at the time of the organization of the Northern Securities Company, hereinafter referred to, to wit, on or about the 13th day of November, 1901, was, and now is, composed of the following named persons, to wit: James J. Hill, James N. Hill, Samuel Hill, William P. Clough, Edward Sawyer, M. D. Grover, Jacob H. Schiff and Henry W. Cannon; and at said date the managing or executive officers of said corporation were and now are as follows: President, James J. Hill; vice president, William P. Clough; secretary and assistant treasurer, E. T. Nichols. That on said last named date said Great Northern Railway Company had issued, and there was then outstanding, a total of one hundred and twenty-five million dollars, par value, of the capital stock of said corporation, and your oratrix is informed and believes, and upon information and belief alleges, that said James J. Hill was on said last named date the owner or in possession and control of, or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

Sixth. That for upwards of ten (10) years prior to 1893 the Northern Pacific Railroad Company, a corporation organ-

ized under and pursuant to an act of Congress of the United States, owned and operated a line of railway between the city of Ashland, in the state of Wisconsin, extending west from the city of Ashland, in the state of Wisconsin, across the state of Minnesota, to Fargo, in the state of North Dakota, and another line of railway extending from the cities of Minneapolis and St. Paul, in the state of Minnesota, to said city of Fargo, and an additional line of railway forming a part of the general system, from Fargo, in the state of North Dakota, westward across the states of North Dakota, Montana, Idaho and Washington, to Seattle, on Puget Sound, aggregating about four thousand five hundred (4,500) miles of railway.

Seventh. That the Northern Pacific Railway Company is now and for upwards of five (5) years last past has been, a corporation organized under and by virtue of the laws of the state of Wisconsin, said corporation being organized during the year 1895; that since said last named date it has continued to operate its system of railways within the state of Washington, and thereby became and continued to be a corporation subject to the laws, regulations and provisions of the said state relating to railway or railroad corporations, including those provisions of the constitution of the state of Washington hereinafter specifically pleaded or referred to.

That under the charter or articles of incorporation of said Northern Pacific Railway Company, the powers of said company are delegated to and exercised by a board of fifteen directors; that during the month of April, 1901, the following named persons constituted and now are the members of the board of directors of said last named company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, William Rockefeller, Charles Steele, James Stillman and Eben B. Thomas. That on the 13th day of November, 1901, J. Pierpont Morgan, with certain other persons to your oratrix unknown, but who were acting with said Morgan, owned and

had in their possession, or held under and subject to their control and disposition, upwards of eighty-five (85) per cent. of the total capital stock of said Northern Pacific Railway Company then outstanding. That the total amount of capital stock of said Northern Pacific Railway Company then issued and outstanding amounts to one hundred and fifty-five millions of dollars, par value, seventy-five millions of dollars of which was preferred stock subject to retirement as provided by the articles of incorporation and agreement under which the same was issued.

That during the year 1893, the said Northern Pacific Railroad Company became insolvent, and all of the property of said last named company, of whatever kind or character, was duly placed in the hands of receivers appointed for that purpose by the Circuit Court of the United States for the eastern District of Wisconsin; and thereafter in proceedings ancillary thereto, by the various Circuit Courts of the United States in whose jurisdiction said property was located; that after the organization of said Northern Pacific Railway Company, it duly purchased and became the owner of the entire railroad properties and railway lines, including the right of way, rolling stock and capital stock formerly owned by the Northern Pacific Railroad Company, and immediately thereafter entered into the possession thereof, and at all times since has continuously owned and operated each and all of said lines of railway so situated within the state of Washington, and which connect the cities of Spokane, Seattle and Tacoma and various other villages and cities within said state and connecting with the lines of railway outside of said state; that the lines of railway now owned and operated by said Great Northern Railway Company within the state of Washington are parallel and competing lines for freight and passenger traffic with the lines of railway now owned, operated and controlled by said Northern Pacific Railway Company within the state of Washington, between the following points in said state, to wit: The city of Spokane and the city of Seattle and the various

cities and villages between said points; also between the said city of Seattle and the cities of Sumas and Blaine and the various cities and villages between said points, as well as the country adjacent to the lines of railway between each and all of said cities; and the said lines of railway owned, operated and controlled by said Great Northern Railway Company; and also the lines of railway owned, operated and controlled by the Northern Pacific Railway Company, which connect with the said lines of railway owned, operated and controlled by each of said companies respectively within the state of Washington, are parallel and competing lines through the states of Washington, Idaho, Montana, North Dakota and Minnesota, to St. Paul and Minneapolis in the last named state, for passenger and freight traffic; that during all of the time aforesaid, each of said lines of railway were maintained and operated by said respective companies as common carriers of freight and passengers within the state of Washington, and that said companies are now and for upwards of eleven (11) years last past have been the only railway companies owning or operating a line of railway across said state and connecting the Pacific Ocean by rail with points in Minnesota; also the only lines of railroad running east and west across the state of Washington; and also the only line of railroad running east and west between the city of Spokane and the city of Seattle in said state; also the only line of railway traversing east and west the northern tier of states of the United States lying west of the Mississippi River and connecting such territory or territory tributary thereto by rail with the Pacific Ocean.

That the Northern Pacific Railway Company was organized as herein set forth for the purpose of purchasing the property, lines and franchises of the said Northern Pacific Railroad Company situated in the state of Washington and elsewhere, as in this complaint set forth, and for the purpose of doing business and operating said railroads as a common carrier in said state; that the articles of incorporation of said Northern Pacific Railway Company contemplate and authorize said com-

pany to operate railroads in the state of Washington, and were entered into with reference to the laws of the state of Washington.

Eighth. That the Chicago, Burlington & Quincy Railway Company is and, for many years last past has been, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; and, as such, until the disposition of its capital stock as hereinafter alleged, owned, operated and controlled an extensive system of railway lines extending from the city of Chicago, in the state of Illinois, in a westerly direction to the city of Denver, in the state of Colorado; and also in a westerly and northwesterly direction from said city of Chicago, to the city of Billings, in the state of Montana; which last named point is a junction and competitive point for freight and passenger traffic with said Northern Pacific Railway Company; and also from said city of Chicago to the cities of St. Paul and Minneapolis, in the state of Minnesota; and in addition to said main lines, owned, operated and controlled a large number of connecting and tributary lines, extending to various cities and towns in the states of Illinois, Iowa, Missouri, Wisconsin, Minnesota, Nebraska, Kansas, Wyoming and Montana. That the total mileage of said railway company is approximately seven thousand four hundred miles. That during the year 1901, the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased ninety-eight per cent. of the total capital stock of said Chicago, Burlington & Quincy Railway Company, aggregating approximately one hundred and seven millions of dollars, par value, and now own the same; and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway Companies, payable in twenty years from the date thereof, and bearing interest at the rate of four per cent. per annum, payable semi-annually. That said Great Northern and Northern Pacific Railway Companies issued and delivered in exchange for each one hundred dollars in amount of said

Chicago, Burlington & Quincy Railway Company stock two hundred dollars in amount of the said bonds.

That said bonds were issued by the Great Northern and Northern Pacific Railway Companies in contemplation of ultimately placing the Great Northern and Northern Pacific lines of railway under a common source of control, and for the purpose of promoting their joint interests.

That under and by virtue of the purchase of said stock the joint ownership and control of the said Chicago, Burlington & Quincy Railway Company is vested in and ever since has been exercised by the said Great Northern and Northern Pacific Railway Companies.

Ninth. That the defendant Northern Securities Company is a corporation organized, existing in and doing business under and by virtue of the laws of the state of New Jersey. That said corporation was organized on the 13th day of November, A. D. 1901, with its principal office for the transaction of its business located at the city of Hoboken, county of Hudson and state of New Jersey and is a citizen of the state of New Jersey.

That the articles of incorporation of said Northern Securities Company are as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

State of New Jersey, ss.

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the Act of the Legislature of the state of New Jersey, entitled An Act Concerning Corporations (Revision of 1896), and the Acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the state of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and

in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds, or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other states and in foreign countries, and to have one or more offices out of this state, and to hold, purchase, mortgage and convey real and personal property out of this state.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars (\$400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars (\$100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and postoffice addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business) are as follows:

| Name and Postoffice Address. | Number of Shares. |
|--|----------------------|
| George F. Baker, Jr., 258 Madison avenue..... New York, New York. | 100 |
| Abram M. Hyatt, 214 Allen avenue..... Allenhurst, New Jersey. | 100 |
| Richard Trimble, 53 East Twenty-fifth street..... New York, New York. | 100 |

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years,

so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the state of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of directors.

As authorized by the Act of the Legislature of the state of New Jersey, passed March 22, 1901, amending the 17th section of the Act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a ma-

jority of the whole board of directors. Any other officer or employe of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws, or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the corporation; to determine whether any, and, if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the payment of dividends; and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine

whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of the state of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

The board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof we have hereunto set our hands and seals, the twelfth day of November, 1901.

Geo. F. Baker, Jr., [*Seal.*]

Abram M. Hyatt, [*Seal.*]

Richard Trimble. [*Seal.*]

Signed, sealed and delivered in presence of

Geo. Holmes.

State of New York, }
County of New York, } ss.
Manhattan. }

Be it remembered, that on this twelfth day of November, 1901, before the undersigned, personally appeared George F. Baker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I, having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

Geo. Holmes,

Master in Chancery of New Jersey.

[*Endorsed.*]

"Received in the Hudson county, N. J., Clerk's Office, Nov. 13, A. D. 1901, and recorded in Clerk's Record No. —, on page —.

"Maurice J. Stack, Clerk."

"Filed Nov. 13, 1901, George Wurts, Secretary of State."

That said Northern Securities Company was incorporated at the instigation and request, and under the direction of, James J. Hill and William P. Clough, and certain other stockholders of said Great Northern Railway Company to your oratrix unknown, who were co-operating with said James J. Hill and William P. Clough, and who, with said Hill and Clough, owned and controlled, or have the disposition and management, as hereinafter alleged, of a very large majority of the capital stock of said Great Northern Railway Company, and J. Pierpont Morgan and certain other stockholders of said Northern Pacific Railway Company, to your oratrix unknown, who were co-operating with said Morgan, and who, with said Morgan, owned and controlled, or have the disposition and management of a very large majority of the capital stock of said Northern Pacific Railway Company. That said Northern Securities Company was formed by George F. Baker, Jr., and Richard Trimble, of the city of New York and state of New York, and Abram Hyatt, of Allenhurst, in the state of New Jersey, who adopted the said articles of incorporation. That said three last named parties had no interest in said corporation other than the formation of the same for and at the request of said James J. Hill, William P. Clough, J. Pierpont Morgan, and their several associate stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, as above alleged, acting in concert with said parties.

That said James J. Hill, William P. Clough and J. Pierpont Morgan, who, with their associates, did on said 13th day of November, 1901, and prior thereto, own and control a large majority of the capital stock of both said Great Northern Rail-

way Company and said Northern Pacific Railway Company, were prior to, and at the time of, the organization of said Northern Securities Company, almost continually in conference with each other and with a large number of other stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, but whose names are to your oratrix unknown, considering such organization and the scheme and agreement herein referred to, and the means and manner by which the laws of Washington, hereinafter referred to, could be most successfully evaded or avoided, all of which facts were well known to the organizers of said Northern Securities Company, including the parties executing the said articles of incorporation. That said Northern Securities Company was organized solely for the purpose of carrying out and accomplishing the designs, agreement and plans of said James J. Hill and J. Pierpont Morgan and their said associate stockholders, as herein set forth, and to effect a consolidation of the property, railway lines, corporate powers and franchises of said Great Northern and Northern Pacific Railway Companies respectively, through said defendant, the Northern Securities Company.

That prior to the organization of said Northern Securities Company, the said owners and holders of a large majority of the capital stock of said Great Northern Railway Company, as well as the owners and holders of a large majority of the capital stock of said Northern Pacific Railway Company, as a part of the scheme or plan herein, alleged, as well as a part of the plan and purpose of the organization of said Northern Securities Company, entered into a mutual agreement or arrangement, the exact terms of which are unknown to your oratrix, but which is in substance as follows:

The said owners of a large majority of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company, mutually agreed with each other and certain persons who thereafter became the officers and directors of said Northern Securities Company to transfer or

cause to be transferred to said Northern Securities Company in exchange for the capital stock of said last named company substantially all of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company, respectively; the said capital stock of the Great Northern Railway Company to be transferred to and exchanged for the capital stock of the said Northern Securities Company on the basis of one share of the capital stock of the Great Northern Railway Company for one and 80-100 shares of the capital stock of said Northern Securities Company, and one share of the common stock of said Northern Pacific Railway Company for one and 15-100 shares of the capital stock of said Northern Securities Company. The \$75,000,000 of the preferred stock of said Northern Pacific Railway Company to be retired in accordance with the provisions of the articles of incorporation of said Northern Pacific Railway Company, and the conditions and agreements under which the same was issued; said retirement to take place on the 1st day of January, 1902. The funds for retiring said preferred stock to be raised by the issuance by said Northern Pacific Railway Company of its negotiable bonds, bearing date November 15, 1901, of the aggregate amount of seventy-five million dollars, payable January 1, 1907, in gold coin of the United States, with interest thereon at the rate of four per cent. per annum, payable semi-annually in like gold coin, from and after January 1, 1902. The said bonds, however, to be convertible at the option of either the holders thereof, or said Railway Company, into shares of the common stock of said Northern Pacific Railway Company at the rate of one share of stock for each one hundred dollars of the principal sum of such bonds, and the said common stock, when so taken in exchange for such bonds, to be converted into stock of said Northern Securities Company upon the basis of one share for each one and 15-100 shares of stock of said Northern Securities Company.

That said preferred stock could only be retired by resolution of the board of directors of said Northern Pacific Railway

Company; that a very large majority of said preferred stock was owned by certain individuals who were opposed to the agreement and plan herein referred to relative to turning over the management and control of said Northern Pacific Railway Company to said Northern Securities Company, and the holding of its stock by said Northern Securities Company; that the owners of said preferred stock so opposed to said agreement and plan were also owners of sufficient of the common stock of said Northern Pacific Railway Company to give them a small majority of the total capital stock of said Northern Pacific Railway Company; thus making it necessary, in order to carry out the plan and agreement herein set forth and to vest the management and control of said Northern Pacific Railway Company in said Northern Securities Company in the manner and for the purposes herein alleged, to retire said preferred stock; all of which was well known to the board of directors of said Northern Pacific Railway Company and to said J. Pierpont Morgan and his associate stockholders of said Northern Pacific Railway Company, as well as said Northern Securities Company.

That on or about the 13th day of November, 1901, the board of directors of said Northern Pacific Railway Company took such official action as was necessary to retire said preferred stock upon the basis and in accordance with the plan and agreement herein set forth; and thereafter said preferred stock was retired by the issuance of the convertible bonds to the amount and in the manner herein alleged. That immediately after the retirement of said preferred stock, said Northern Pacific Railway Company, acting through its board of directors and executive officers, exercised its right and option of declaring said bonds to be convertible into shares of the common stock of said Northern Pacific Railway Company, and thereupon the same were so converted and the common stock of said Northern Pacific Railway Company issued in exchange therefor, upon the basis and for the purposes herein alleged. That in order to prevent the persons who owned said preferred stock,

and who were opposed to the carrying out of the plan and agreement herein referred to, from acquiring a like control of the common stock, it was provided that the \$75,000,000 of common stock into which the said bonds were convertible could only be subscribed for and taken by holders of the then outstanding \$80,000,000 of the common capital stock of said Northern Pacific Railway Company; each share of said common stock then outstanding entitling the owner and holder thereof to take an additional seventy-five-eightieths of a share of said \$75,000,000 additional common stock. That the retirement of said preferred stock and the conversion of the said bonds into common stock of said Northern Pacific Railway Company, and the exchange of said common stock for stock of said Northern Securities Company, as herein alleged, were each and all a part of the agreement, plan and scheme of said J. Pierpont Morgan and his said associate stockholders of said Northern Pacific Railway Company, who then and there owned and controlled a large majority of the then outstanding common stock of said Northern Pacific Railway Company, under and by which the complete management and control of said Northern Pacific Railway Company was to be, and was thereafter, turned over to and vested in said Northern Securities Company in order that said Northern Pacific Railway Company, its property and franchises, might be in effect consolidated with the property and franchises of said Great Northern Railway Company, as herein alleged. That said James J. Hill and his associate stockholders of said Great Northern Railway Company had full knowledge of and assisted in retiring said preferred stock for the purposes and objects herein alleged. That as a part of said agreement and plan entered into between said James J. Hill and his associate stockholders and said J. Pierpont Morgan and his associate stockholders, each and all of whom were then, and are now, acting in concert for the purpose of evading and violating the laws of the state of Washington, in the manner, for the purposes, and with the object and design herein set forth, and in further-

ance of said purposes and design, and to avoid the effect of any litigation which might be instituted to defeat the consummation of the agreement, plan and scheme herein referred to of vesting the complete management and control of the railway lines, properties and franchises of said Great Northern and Northern Pacific Railway Companies in said defendant Northern Securities Company, said parties further undertook and agreed with each other and the persons who thereafter became the officers and directors of the defendant Northern Securities Company that pending the delivery and transfer of a majority of the capital stock of said Great Northern Railway Company to said Northern Securities Company, the same should be held by or under the control of some person or corporation to your oratrix unknown; and that pending such delivery it was mutually agreed between said Hill and his associate stockholders and said Morgan and his associate stockholders and the persons who thereafter became the directors and officers of the Northern Securities Company, as well as the person or corporation so temporarily holding said stock that the same should be held during said period for the purposes above set forth in trust for the use and benefit of the defendant, the Northern Securities Company; and that during such time the parties so holding said stock should attend and vote the same at all meetings of the stockholders of said Great Northern Railway Company, in the interests of the defendant, and as directed by the board of directors of said Northern Securities Company or the executive committee thereof, or in unison with the stock of said railway companies, actually assigned to and held by the defendant. That said Northern Securities Company has not purchased, and does not intend to purchase, the stock of either of said railway companies, except by issuing its stock in exchange for and in lieu of the stock of said railway companies on the basis and in the manner and for the purposes herein alleged.

That for the unlawful purposes aforesaid the said Northern Securities Company, by circular letter heretofore issued to the

public, has offered and is still offering to issue and exchange for the capital stock of the said Great Northern and Northern Pacific Railway Companies, capital stock of said Northern Securities Company to the amount of one hundred and eighty dollars par value thereof for each share of capital stock of said Great Northern Railway Company and to the amount of one hundred and fifteen dollars par value thereof for each share of stock of said Northern Pacific Railway Company. And that the said Northern Securities Company is about to receive, on the basis aforesaid, and will, unless enjoined therefrom, receive, hold and hereafter control all the capital stock of said Great Northern and Northern Pacific Railway Companies.

That on the basis of exchange aforesaid, the former stockholders of the Great Northern Railway Company have received, or will receive, about fifty-five (55) per cent. of the stock of the Northern Securities Company, the balance going to the former owners of the common stock of the Northern Pacific Railway Company. That the mutual agreement or arrangement, given in substance in this paragraph, was entered into at the city of New York.

Tenth. That the organization of said Northern Securities Company in the manner hereinbefore alleged, and the making of said agreement or arrangement hereinbefore referred to, are each and all a part of a scheme or plan on the part of said James J. Hill and his said associate stockholders of the Great Northern Railway Company, and J. Pierpont Morgan and his said associate holders of the stock of said Northern Pacific Railway Company, under and by which the said two last named railway companies are to be in effect consolidated, and the complete management and control of the business affairs of said corporations respectively placed in one body and under the direction and control of one man or one board of directors, through and by means of said defendant. That pursuant to said plan, agreement and arrangement, and in consummation thereof, and for the purpose of placing the complete management and control of said Great Northern Railway Company

and said Northern Pacific Railway Company under one management, and for the purpose of establishing, in effect, a consolidation of said railway companies, together with said railway lines and properties, through said securities company, the said J. Pierpont Morgan and his associate stockholders have actually assigned and delivered to said Northern Securities Company upwards of ninety-eight per cent. of the total capital stock of said Northern Pacific Railway Company; and your oratrix alleges, on information and belief, that said James J. Hill and his associate stockholders of said Great Northern Railway Company, have also actually assigned and delivered to said Northern Securities Company upwards of seventy-five per cent. of the capital stock of said Great Northern Railway Company; and that said Northern Securities Company is voting all of said stock, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of said railways, and will continue to do so unless restrained by this court.

That the sole purpose, object and effect of the transfer of said stock by J. Pierpont Morgan and his associates and said J. J. Hill and his associates, as well as the incorporation of the Northern Securities Company and the receipt by it of a controlling amount of the capital stock of the said Northern Pacific and Great Northern Railway Companies, as well as each act of the officers and board of directors thereof, in entering into, adopting or executing the agreement or plan herein set forth, including the issuance and exchange of the capital stock of the Northern Securities Company for the stock of the said Northern Pacific and Great Northern Railway Companies on the basis hereinbefore set forth, was and is to place the said railway companies and the property and franchises thereof under a single management, and enable a single party or body of men acting as the board of directors of the said Northern Securities Company, or such executive committee as they may designate, to fix all rates and charges for the transportation of passengers and freight over any and all the lines of railway.

of each of said companies, and thereby create, foster and perpetuate a monopoly in railway traffic in the state of Washington; to unlawfully restrain and prevent competition among said railway systems in respect to such trade and commerce; to determine what trains shall be operated over each or any of the lines of railway of each of such railway companies; and to remove all competition in freight or passenger traffic over said parallel and competing lines, and prevent the building of lines into new territory, as well as into territory now reached by only one of such lines of railway. That the purpose of said agreement and unlawful conspiracy and of the parties thereto, was the creation of a trust, or the formation of a combination by which a monopoly of railway traffic in the state of Washington and elsewhere, would be perfected; that the said Northern Securities Company was organized for and is to be used as a medium through and by which this unlawful agreement, conspiracy, purpose and object can, and, if not enjoined, will be, accomplished; that this agreement and conspiracy, and the consummation thereof, is in restraint of trade, tends to create a monopoly in railway traffic in the state of Washington and elsewhere, is against public policy and void; that the holders of a large majority of the capital stock of the said Great Northern Railway Company and the holders of a majority of the common stock of the Northern Pacific Railway Company, as well as each member of the board of directors of said railway companies, had knowledge of, consented to, and assisted in carrying out the agreement, arrangement and scheme hereinbefore set forth, by which a large majority of the capital stock of each of said railway companies was to be exchanged for the capital stock of said Northern Securities Company, upon the basis and for the purposes herein set forth; that said stockholders of the Great Northern and Northern Pacific Railway Companies so consenting to, taking part and assisting in the formation of said Northern Securities Company, and in perfecting the agreement and scheme herein set forth, constitute all of the stockholders of the said Northern Securi-

ties Company; and the board of directors and executive officers of said Northern Securities Company, hereinafter named, have been selected from and elected by such stockholders of said Great Northern and Northern Pacific Railway Companies.

Eleventh. That if the defendant, the Northern Securities Company, has not acquired a large majority of the capital stock of the defendant, the Great Northern Railway Company, it is because said James J. Hill and his associates and said J. Pierpont Morgan and his associates in the combination or conspiracy charged in this bill, or some of them, since it became apparent that the legality of their corporate device for the merger of the stock of competing railway companies through the instrumentality of a central or holding corporation, would be assailed in the courts, have purposely withheld, or caused to be withheld, a large amount of the capital stock of said railway company from transfer for the stock of the Northern Securities Company, and have purposely discouraged and prevented the transfer and exchange of such stock for the stock of the Northern Securities Company, all for the purpose of concealing the real scope and object of the unlawful combination or conspiracy aforesaid, and of deceiving and misleading the state and Federal authorities, and of furnishing a ground for the defense that the Northern Securities Company does not hold a clear majority of the stock of the Great Northern Railway Company. The complainant avers that such stock, so withheld or not transferred to the Northern Securities Company, is now in the hands of some person or persons (unknown to the complainant) friendly to and under the influence of the said parties named and their associates aforesaid, or some of them, and will either not be voted, or be voted in harmony with the Great Northern stock held by the Northern Securities Company, until the question of the legality of this corporate device for merging competing railway lines shall be finally and judicially determined, when such stock will either be turned over to the Northern Securities Company or continue to be held

and voted outside said company but in harmony with the Great Northern stock held and voted by it, as may at the time seem advisable.

Twelfth. That by the organization of the Northern Securities Company for the transfer thereto of said stock in the execution of said unlawful plan and conspiracy, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common stockholder, the Northern Securities Company, was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities Company. The individual stockholders of the Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in said railway companies and having become stockholders in what may be described as in part a holding corporation, both classes of holders were to draw their dividends from the earnings of both systems, collected and distributed by such holding corporation. In this manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit: the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and

foreign commerce formerly carried on by the two systems as independent competitors established.

Thirteenth. That under the articles of association of the said Northern Securities Company, its corporate powers and entire business management is vested in a board of directors consisting of such number as shall be fixed from time to time by the by-laws of said corporation; that the board of directors is authorized to make such by-laws as it deems best, and to alter, amend or repeal the same. Said board of directors thereby has power to determine its own number and adopt regulations for its own conduct and the conduct of the affairs of said corporation. The articles of association further provide that said board may appoint an executive committee thereof, which shall exercise all the powers and duties of said board of directors. Among other purposes and powers designedly inserted in said articles is the purpose and power to not only hold and vote shares of the capital stock of other corporations, but to aid in any manner any corporation of which any bonds or stock are held, and to do any act or things designed to protect, preserve, improve or enhance the value of any such bonds or stock.

That as a part of such illegal conspiracy hereinbefore set forth, it was agreed between said James J. Hill and his said associates, and J. Pierpont Morgan and his said associates, by and with the knowledge, assent and approval of the officers and directors of the Great Northern and Northern Pacific Railway Companies, that the first board of directors of the said Northern Securities Company should be named by said J. Pierpont Morgan from the respective boards of directors of the said Great Northern, Northern Pacific, and Chicago, Burlington & Quincy Railway Companies; that said J. Pierpont Morgan was acting in harmony with said James J. Hill, president of the Great Northern Railway Company, and it was then and there mutually understood and agreed as a part of such illegal plan and conspiracy, that only such persons should be designated members of such board of directors as were first

approved by said James J. Hill, such approval to be given only to such persons as would act in harmony with and under the direction, dictation and control of said James J. Hill; and complainant further alleges that said James J. Hill was, in furtherance of said plan, elected or designated president of the Northern Securities Company.

That on or about the 14th day of November, 1901, as a part of such plan and conspiracy, and pursuant to the illegal agreement or scheme above referred to, and in consummation thereof, the board of directors of the said Northern Securities Company was designated by J. Pierpont Morgan and James J. Hill and elected by the stockholders and consisted of the following named persons, to wit: James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman, N. Terhune, Samuel Thorne, Charles E. Perkins, Jacob H. Schiff, William P. Clough, John S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon and E. H. Harriman; that on the 15th day of November, 1901, pursuant to said plan and conspiracy, and in consummation thereof, the said board of directors met and elected the following executive officers of the said company, to wit: President, James J. Hill; first vice-president, John S. Kennedy; second vice-president, George F. Baker; third vice-president, D. Willis James; fourth vice-president, William P. Clough; secretary and treasurer, E. T. Nichols.

Complainant further alleges that said James J. Hill and William P. Clough were, on said last named date, president and vice-president, respectively, of said Great Northern Railway Company; that said E. T. Nichols was on said date, and now is, secretary and treasurer of said Great Northern Railway Company.

That said James J. Hill and his associate directors and officers of said Northern Securities Company own and control a majority of the capital stock of said last named company; that during the month of December, 1901, said Northern Securities Company, through its directors and executive officers, began dictating the policy and management of said Northern

Pacific as well as said Great Northern Railway Company, and ever since has been and now is directing and managing the business and property of both said Great Northern and Northern Pacific Railway Companies, and determining and enforcing freight and passenger rates on many of the lines of railway of said companies in the state of Washington, and also the manner and means of handling the freight and passenger business of said companies on such lines of railway, and will continue so to do unless enjoined as herein prayed.

That said Northern Securities Company has no authorized agent or representative within the state of Washington, on whom a summons or other process in any legal proceeding may be served. And is not the owner of any property of any nature whatsoever situated in the state of Washington.

That the massing and concentration of said railway properties and the control and management thereof in the said Northern Securities Company in the manner hereinbefore outlined, tends to and does create a monopoly in railway traffic in the state of Washington, and elsewhere and tends to and does deprive the state of Washington and the citizens thereof of the privilege of competition in fixing charges and rates of transportation for a large amount of freight transported annually over the lines of railway of each of said railway companies, between stations upon the lines of railway of both said companies within said state.

Fourteenth. That it has ever been a part of the settled and public policy of the state of Washington to prohibit therein, the consolidation in any manner, of competing and parallel lines of railway and to this end the people thereof, on the first day of October, A. D. 1889, in organizing and adopting a state government, adopted as a part of the constitution of said state, the following provisions, which ever since have been and now are a part of the organic law of said state, to wit:

"Art. XII., Sec. 14. No railroad company or other common carrier shall combine or make any contract with the

owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."

"Art. XII., Sec. 16. No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a competing line."

"Art. XII., Sec. 22. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. . . ."

That in the organization of the Northern Securities Company, the purpose, object and design of said organizers and promoters thereof, both in the organization and in making and carrying out the said plans, agreement and conspiracy hereinbefore referred to, and the purpose, intent and design of the said Northern Securities Company, as well as the said Great Northern and Northern Pacific Railway Companies, their stockholders, directors, executive committee, officers, agents and representatives in the execution of such plan, agreement and conspiracy, was and is to violate the said constitutional provisions and to escape and evade the terms and provisions thereof, and effect a consolidation of the stock of the said railway corporations, and a practical consolidation of said railway properties as herein alleged; and was and is to make a contract and combination between common carriers doing business in the state of Washington, in and by which the earnings of such common carrier doing the carrying or transporting of freight and passengers in said state are to be shared by the other not doing such carrying; and further alleges that the de-

fendant Northern Securities Company is simply a holding company, but, as such, is a common carrier or railroad company within the meaning of the constitution of said state and the laws of the land. That each and all of said acts violates and evades the laws of the land and the settled public policy and laws of the state of Washington, and unless said defendants are enjoined as hereinafter prayed, will inflict irreparable injury upon said state and its people.

That for many years last past, it has been and is now, a part of the settled policy of the state of New Jersey to permit the consolidation of only such lines of railroad, as are or can be connected so as to form continuous lines of railway, and not to permit the consolidation of parallel or competing lines and to that end, in the year 1885, the Legislature of the state of New Jersey enacted a law which permits the consolidation of such lines as are or may form connecting or continuous lines of railroad.

Your oratrix is informed and believes, and upon information and belief alleges, that the defendant, the Northern Securities Company, is not the owner or holder of any property or stock or securities of any corporation, except as above set forth, and is not engaged in any business whatever, except such as is incidental to the holding of such stock, and indirectly dictating through its officers, or the officers and directors of said railway companies, the general management and control of the said railway companies and lines and properties thereof.

Your oratrix further alleges that if the defendant, the Northern Securities Company, is permitted to control and manage the affairs of the said Great Northern and Northern Pacific Railroad Company, either directly or indirectly, in the manner hereinbefore alleged, or otherwise, or to vote the stock of said railway companies, or either of them, all competition between said companies will forever cease, and a monopoly in railway traffic in the state of Washington and elsewhere, be created, to the great, permanent and irreparable damage and

injury to said state and to the people thereof, and in violation of its laws and of the laws of the land.

That your oratrix has and can have, no other adequate remedy or relief by action at law, except as herein prayed for in equity.

To the end, therefore, that the defendants, the Northern Securities Company, the Great Northern Railway Company and the Northern Pacific Railway Company, may, if they can, show cause why your oratrix should not have the relief herein prayed for, and that they may be compelled to answer all and singular the premises and all the matters and things herein stated, as fully and particularly as if they were here again repeated, and the said companies thereunto interrogated, and that the said defendants may be required to answer without oath, their answer under oath being hereby expressly waived, and that the defendant, the Northern Securities Company, its officers, directors, attorneys, representatives, agents, servants and executive officers, and each of them, be perpetually enjoined and restrained:

First. From voting at any meeting of the stockholders of either the said Great Northern or Northern Pacific Railway Company, any of the capital stock of either of said companies, by any means or in any manner whatever, or from in any manner acting as the owner of any shares of capital stock of either of them, and from attending by reason of such ownership, possession or control of stock, either through its officers or by proxy, any meeting of the stockholders of either of said railway companies.

Second. From in any way aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner, in the management, control or operation of any of the lines of railway of either of said railway companies, or in the management or control of the affairs thereof.

Third. From exercising any of the powers or performing any of the duties or in any manner acting as a representative,

officer, member of the board of directors, or employe of either said Great Northern or Northern Pacific Railway Company, or in any way exercising the management, direction or control of the same.

Fourth. In case it shall appear upon the trial that the defendant, the Northern Securities Company, holds or controls, or is acting in concert with the owners of a majority of the capital stock of either of said railway companies, and owns and controls a minority of the stock of the other of said companies, then that the defendant, the Northern Securities Company, its officers, directors, agents or representatives, be enjoined and restrained from receiving, acquiring or controlling any additional capital stock of said other railway company.

Fifth. That the defendants, the Great Northern Railway Company and the Northern Pacific Railway Company, their stockholders, officers, directors, agents and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of the capital stock of either of said railway companies, and from permitting said Northern Securities Company to vote such stock, whether by proxy or otherwise, and from paying any dividend upon such stock to said company or its assigns, unless authorized by this court, or from recognizing as valid any transfer, mortgage, pledge or assignment by such company, of such stock, unless authorized by this court.

Sixth. That the Great Northern Railway Company, its stockholders, officers, directors, agents and servants, and each of them, be perpetually enjoined from in any manner interfering with, dictating or controlling the policy of the management or the business affairs or the said Northern Pacific Railway Company.

Seventh. That the Northern Pacific Railway Company, its stockholders, officers, directors, agents and servants, and each

of them, be perpetually enjoined from in any manner interfering with, dictating or controlling the policy of the management or the business affairs of the said Great Northern Railway Company.

Eighth. And your oratrix further prays the leave of this court to amend this its bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

And that the complainant be granted such other and further relief as the nature of the case may require, and as shall be agreeable to equity and good conscience:

May it please your honors: To grant unto your oratrix a writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants, the Northern Securities Company, a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, and a citizen of the state of New Jersey as herein alleged, the Great Northern Railway Company, a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota, and a citizen of the state of Minnesota as herein alleged, and the Northern Pacific Railway Company, a corporation organized, existing and doing business under and by virtue of the laws of the state of Wisconsin, and a citizen of the state of Wisconsin as herein alleged, strictly commanding said defendants under certain penalty, and on a certain day therein to be named, to be and appear before this honorable court to stand and abide by such order and decree as this honorable court may make in the premises. And to this end your oratrix will ever pray.

W. B. Stratton,

Attorney General, State of Washington,
and Solicitor for Complainant.

United States of America, State of Minnesota,
District of Minnesota.

W. B. Stratton, being duly sworn, upon oath says, he is the attorney general of the state of Washington, and that he has resided in the state of Washington for a number of years last past; that he is well acquainted with the facts and circumstances set forth in the foregoing bill of complaint; that he has read the same and knows the contents thereof and that the same is true of his knowledge, except as to matters therein stated upon information and belief, and as to such matters he is informed and believes the same to be true.

Subscribed and sworn to before me this — day of March,
A. D. 1902.

Notary Public, Ramsey County, Minnesota.

(1) Taken from *Washington v. The Northern Securities Co.*, 185 U. S. 254.

No. 2107a.

**Bill of Complaint in Suit to Enjoin Cutting Off of Gas
Supply.(1)**

SUPREME COURT OF THE UNITED STATES

IN EQUITY

No. 34, Original—October Term, 1918

The State of Ohio, Complainant,

vs.

The State of West Virginia, Defendant.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your orator, the State of Ohio, and one of the states of the United States of America, by John G. Price, its attorney general, presents this bill of complaint against the state of West Virginia, also one of the States of the United States of America, by virtue of the direction and authority contained in a joint resolution of the General Assembly of the state of

Ohio, adopted on the twenty-fifth day of March, 1919, a copy of which joint resolution is hereto attached, marked Exhibit "A," and as fully made a part hereof as if copied herein, and also by the written direction of the governor of the state of Ohio under authority of section 333 of the General Code of Ohio; and thereupon your orator complains and says:

First. That in, under and beneath large tracts of land in the state of West Virginia, natural gas has been discovered, and for more than twenty years last past has been known to exist in large quantities, of great value for use as fuel and in the production of light and heat, and for all other purposes for which it is adaptable or can be used, and during such time has attracted the attention of persons, many of whom have been citizens of Ohio, having capital and desirous of investing the same in mining and drilling for, producing, utilizing and otherwise disposing of such natural gas for the purposes hereinafter set forth, and that since such discovery and development of gas, as aforesaid, and in the counties of Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Gilmer, Hancock, Harrison, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mingo, Monongalia, Nicholas, Ohio, Pocahontas, Pleasants, Putnam, Taylor, Upshur, Ritchie, Roane, Tyler, Wayne, Wetzel, Wirt, Wood, a very large and increasing number of natural gas wells, and being many thousands in number, have been drilled and equipped, and are being drilled and equipped, and in the drilling of which, and in the locating and development of said gas fields, large sums of money aggregating many millions of dollars have been expended and large numbers of workmen, both skilled and unskilled have been, and now are actively employed; that the development of the gas territory is a mining venture, of very great uncertainty and hazard; that the gas fields of West Virginia have been developed from their inception, and are being developed to a great extent by Ohio citizens and corporations.

Second. That many cities in and near the districts of West Virginia in which said gas is found, have been supplied with gas distributing plants, and transportation lines have been laid from said wells in the said fields to said distributing plants and by and through the same to the various cities and industrial districts of the state of West Virginia; that if there be furnished a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public or any part of the public, within said state of West Virginia, and for which said consumer or consumers therein shall apply, then in that event, substantially, if not entirely, all of the gas produced in West Virginia will be required to meet said demands, the result of which will be the denial of natural gas to even the preferred or domestic consumers in Ohio.

Your orator further avers that the persons and corporations, herein referred to as engaged in the production and transportation of natural gas from the state of West Virginia into and distributing the same in the state of Ohio, also furnish natural gas for public use, and for the use of the public, in the state of West Virginia; that in the early stages of the development of the natural gas fields in West Virginia, and until the years immediately last past, all the demands for natural gas in West Virginia, whether domestic, industrial or otherwise, were supplied and only the surplus was transported into the state of Ohio; that with the increased consumption and demand for natural gas in West Virginia, as now exists, with the enforcement of the provisions of the said West Virginia law herein under consideration, and the enforcement of said law is mandatory, the supply of natural gas from the state of West Virginia as now transported into Ohio, will not be allowed even for the first preferred class of consumers in Ohio, to-wit, domestic consumers, and furthermore the transportation of gas from West Virginia into Ohio will be entirely prohibited.

Third. That since prospecting began for natural gas in West Virginia and the discovery of the same, for more than twenty years last past, there has been transported and conveyed from the state of West Virginia into the state of Ohio large quantities of natural gas for use and consumption within the said state of Ohio. That at the time of the discovery and development of the gas fields of West Virginia there was in relation to the supply a very small demand therefor within said state of West Virginia; that because of the discovery of said natural gas in the state of West Virginia and the transportation thereof into the state of Ohio for the uses aforesaid, the Ohio cities of Cleveland, Cincinnati, Columbus, Dayton, Akron, Canton, Hamilton, Portsmouth, Springfield, Youngstown and many other municipalities in the state of Ohio have constructed for the purpose, and now maintain natural gas distributing plants, or such plants have been constructed therein by private capital, through which said natural gas so transported from West Virginia can be, and is distributed, delivered and sold to persons therein desiring to use the same for light, heat and fuel, and for other purposes and uses to which the same may be put; that these distributing plants have been built and constructed at great cost and expense; the fact is that all of the inhabitants in said municipalities aforesaid, and in many other municipalities in Ohio, are now wholly dependent upon the use of natural gas for light, heat, fuel and other purposes to which the same can be, and is being put (except only the limited extent to which steam or coal is or can be used.)

Fourth. That many corporations and companies, among others, United Fuel Gas Company, The Ohio Fuel Supply Company, The East Ohio Gas Company, The Northwestern Ohio Natural Gas Company, and The Logan Natural Gas & Fuel Company have, at great cost and expense, amounting to many millions of dollars, laid, built and constructed from the said cities of Ohio, as aforesaid, and also from many other cities and villages of the state of Ohio, to the gas producing

fields of West Virginia, large trunk lines for the transportation of natural gas to the said cities for distribution, sale and use in the said cities; that the transportation to and distribution, sale and use of natural gas in the said cities have been conducted and carried on for many years last past, under contracts then and still existing between the said companies on the one hand, and your orator, the state of Ohio, and the said municipalities on the other hand, until the inhabitants and consumers thereof, in the said municipalities and elsewhere in the said state of Ohio, as well as your orator, the state of Ohio, now rely almost wholly upon the use of natural gas for light, heat, fuel, and other purposes, and there has grown up and now is a great and heavy demand and market for natural gas, which is daily growing larger, as the people of the said municipalities become more accustomed to the use thereof; that such demand has now grown to such extensive proportions that in the said municipalities aforesaid and many others in Ohio, the local distributing companies supplying the same and securing their gas supply from the said gas trunk pipe lines, are unable to meet the increasing demand, and there has been, and now is, from time to time, a shortage of natural gas therein, even when the use thereof is limited to domestic purposes. All contracts in Ohio with consumers of natural gas provide for preference to domestic consumers, and for cutting all other classes of users in case of shortage of supply of natural gas.

Fifth. Your orator further avers and charges that the transportation in interstate commerce of natural gas by means of, and through pipe lines, is and has been for many years extensively carried on in, through and among the Dominion of Canada, the states of New York, Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Illinois, Missouri, Kansas, Oklahoma, Texas, Arkansas, Louisiana and other states in the United States and that there are now over five thousand miles of main trunk gas lines laid and operated in the said states and Canada and the transportation of West Virginia natural gas by means thereof has grown to, and is now a great industry,

with many millions of dollars invested therein and the use of said trunk lines and pipes has become, and now is the universal method of transporting natural gas. Your orator further says that natural gas has become and now is a widely known and well established article of interstate commerce and the traffic therein between and among the states, has grown to enormous proportions—immense quantities thereof, aggregating each day hundreds of millions of cubic feet, being transported in interstate commerce from Pennsylvania into New York, from West Virginia into Ohio, Pennsylvania, Kentucky and Maryland, from Kansas into Missouri, from Ohio into West Virginia and Pennsylvania, and from Pennsylvania into Ohio, from Oklahoma into Kansas, Missouri and Texas.

Sixth. That there is now laid, maintained and operated in the state of Ohio and from Ohio into the state of West Virginia more than one thousand miles of connecting natural gas main pipe lines, in daily use for the transportation and carriage of natural gas, both within and out of the said states; that said pipe lines have a property value of at least \$25,000,000; that more than half of the said thousand miles of pipe lines so constructed, as aforesaid, in the state of Ohio, were laid for the exclusive purpose of, and are now engaged in, transporting and handling natural gas produced in the state of West Virginia.

Seventh. Your orator, the state of Ohio, further avers that it is the owner and proprietor of a large number of state institutions established for penal, eleemosynary, educational and governmental purposes, within the state of Ohio, to-wit:

Athens State Hospital, at Athens, Ohio.
Cleveland State Hospital, Cleveland, Ohio.
Columbus State Hospital, Columbus, Ohio.
Dayton State Hospital, Dayton, Ohio.
Longview State Hospital, Cincinnati, Ohio.
Epileptic Hospital, Gallipolis, Ohio.
Massillon State Hospital, Massillon, Ohio.
Toledo State Hospital, Toledo, Ohio.

Ohio Feeble-Minded Institution, Columbus, Ohio.
Ohio State School for the Blind, Columbus, Ohio.
Ohio State School for Deaf, Columbus, Ohio.
Ohio State Sanitorium, Mt. Vernon, Ohio.
Soldiers' and Sailors' Home, Sandusky, Ohio.
Boys' Industrial School, Lancaster, Ohio.
Girls' Industrial School, Delaware, Ohio.
Ohio Penitentiary, Columbus, Ohio.
Ohio State Capitol, Columbus, Ohio.

That said natural gas so transported from West Virginia and used as aforesaid, is also used in municipal buildings and for municipal and street lighting in the counties, townships and municipalities of the state of Ohio. That all of said gas so used in governmental buildings, in the state institutions, counties, townships and municipalities as aforesaid is supplied and used under existing contracts made and entered into between the state of Ohio and the political subdivisions thereof, respectively, and the producers and distributors of said natural gas who bring the same from the state of West Virginia.

That the state of Ohio, through its officers and agents, has found it convenient and profitable to use natural gas, as aforesaid, for the production of heat, light and fuel, at its said state institutions, and that it has provided and established equipment for the use of the said natural gas in its said institutions at an expense of many thousands of dollars, all of which equipment would become useless for all practical purposes, if your said orator should be unable to continue to obtain a supply of the said natural gas from the state of West Virginia for its said institutions, and would have a mere salvage value to the said state of Ohio. Your orator further says that on account of the great convenience and economy of the said natural gas, it has been enabled to save in labor and fuel costs, large amounts of money, which it would otherwise have required to expend for said labor and fuel. That it has found the use of the said natural gas to be healthful in its various institutions for the treatment of abnormal persons, where clean and sanitary sur-

roundings are of the greatest importance and that if it were deprived of a supply of said natural gas it would be obliged to tear out all of its equipment, which it has now established, and substitute therefor equipment and furnaces for the use of coal or some other fuel, which would impose upon your orator not only the great expense of changing all of its equipment, but further, the hardship and inconvenience of being deprived of such a convenient, clean and economical fuel as natural gas; that the said state of Ohio, your orator, used in its said public institutions, during the year ending June 30, 1918, a total amount of three hundred and sixty-nine million, three hundred and eighty-nine thousand (369,389,000) cubic feet of gas; that a large proportion of the gas so used by your orator, as aforesaid, is being and has been obtained and transported from the gas fields of West Virginia, that if your orator should be deprived of that part of its supply which is obtained and transported from the said gas fields of West Virginia, its supply would be insufficient in pressure and quantity, for practical use, and it would be obliged to abandon the use of natural gas for the purpose aforesaid. Your orator further avers that its citizens, and citizens of other states have invested in Ohio in the business of transporting and furnishing natural gas to consumers in Ohio, approximately the sum of \$150,000,000, from which said investment the said state of Ohio, and the political subdivisions thereof, annually receive large sums of money as taxes on such tangible property and as franchise taxes upon corporations engaged in the business of furnishing and transporting natural gas from the said state of West Virginia, into and within the said state of Ohio. Your orator further shows that many of the citizens and residents of the state of Ohio have become and are bound by valid, existing and unexpired contracts and franchises, heretofore entered into with the said state of Ohio, and with municipalities and cities within the said state of Ohio, as well as with private citizens of the state of Ohio, to furnish natural gas to consumers in Ohio, for heat, cooking and lighting, the source of supply of

natural gas for the fulfillment of which contracts is in the state of West Virginia.

Eighth. That the legislature of the state of West Virginia passed on February 12, 1919, and the governor approved on February 17, 1919, an act entitled:

"An act in relation to persons, firms and corporations engaged in furnishing, or required by law to furnish natural gas for public use within this state, to provide remedies for the enforcement of this act and penalties and punishment for violation thereof, and to extend the jurisdiction of the public service commission and of the courts of this state with respect thereto," to be effective May 10, 1919, a copy of the full text of which act is hereto attached, marked Exhibit "B" and as fully made a part hereof, as if copied herein. That said act provides in substance that every person engaged in furnishing natural gas for public use, within the state of West Virginia, is bound to furnish a full supply of natural gas to all users within the said state, who shall apply for such natural gas, before any natural gas whatever shall be transported out of the state; that if any natural gas distributor shall have an insufficient supply of gas to supply all demands made upon it, then any other gas company producing or transporting gas within the said state, shall be obliged to establish physical connections with the said distributor which has a shortage as aforesaid, and give to the said distributor having a shortage as aforesaid, sufficient gas to supply all wants of all consumers within the said state of West Virginia, before any natural gas whatever, shall be transported outside the state of West Virginia. The said act empowers the public service commission of the said state of West Virginia, to make orders requiring companies to conform to the provisions of the said pretended law, the effect of which would be to give all consumers within the state of West Virginia, whether domestic, industrial or otherwise, an exclusive, prior right to said natural gas over consumers in the state of Ohio, so that the said West Virginia consumers can appropriate and use the said natural gas while

enroute through pipe lines from West Virginia into Ohio without regard to, or consideration for consumers in Ohio, and without regard to the contracts of purchase or the rights, duties and obligations of those who transport said gas under contracts made for the sale and delivery thereof, and in absolute disregard of the fact that natural gas is a legitimate subject of interstate commerce, and is at the time moving in interstate commerce. The provisions of section 5 of said act impose fines so large and imprisonment so protracted and severe and makes each day in which said violation is continued a separate and distinct offense as to be unconscionable, and unwarranted, and would, in effect, deny the right of appeal for judicial relief of the aggrieved person against whom the orders of the commission of West Virginia may be made. The enforcement of said act in all its provisions is mandatory. The officers charged with its enforcement must make orders in conformity to its provisions, and those against whom said orders are made must comply with the same or suffer the penalties aforesaid. Section 7 of said act provides that the word "person" within the meaning of this act, shall be construed to mean and to include persons, firms and corporations.

And your orator avers and charges that this act was passed solely and only for the purpose of preventing the transportation of natural gas beyond the borders of the state, and that it is wholly illegal and void, because it conflicts with, offends against, and is in contravention of clause 3 of section 8 of article I of the constitution of the United States, granting to Congress the power to regulate commerce between states, in that it purports to give to the public service commission of the state of West Virginia, the right to inhibit the exportation of an article of interstate commerce; and of the fourteenth amendment of the constitution of the United States, in that it abridges the privileges and immunities of the residents and citizens of your orator, the state of Ohio, who are also residents and citizens of the United States, and deprives them of their property, without due process of law, and denies to them the equal

protection of the law; and of section 10 of article I of the constitution of the United States, in that it impairs the obligation of contracts of your orator, the state of Ohio, and of the citizens and residents of your orator.

Ninth. That your orator avers that the effect of said statute is to require the said persons and companies so engaged in producing natural gas within the state of West Virginia and transporting it outside the state of West Virginia for sale and distribution, as well as those companies which are engaged only in transporting gas from the state of West Virginia, to devote their entire supply of natural gas to the needs and wants of users and consumers inside the state of West Virginia, and to transport no gas whatever outside the state of West Virginia. That your orator is informed and believes that it is the purpose of defendant to impose fines and penalties upon any person or company that shall refuse to comply with the terms of said act or to obey such orders of said public service commission of West Virginia and that it is their purpose, and the effect of said act, wholly to prevent the exportation of natural gas outside of the state of West Virginia and thereby cut off from users of natural gas in the state of Ohio and in other states generally, as well as from your orator, the state of Ohio, in particular, that part of their said natural gas supply which they now obtain from the state of West Virginia.

Tenth. That your orator's rights in the premises are of great value and that the defendant's proposed wrongful and illegal acts and doings hereinbefore mentioned, would cause your orator great and irreparable pecuniary loss and injury and would deprive more than four millions of people who are citizens and residents of your orator, the state of Ohio, of the supply of natural gas upon which they are now dependent, to the great danger of life and to the detriment of the health, comfort and convenience of the domestic consumers within the state of Ohio and would deprive the state of Ohio of its said large income from taxes upon said gas properties, and would ruin the business and destroy and impair the value of

the property of many persons and corporations, citizens of the state of Ohio, the total threatened loss to your orator and to its citizens and residents being many millions of dollars. That the defendant, the state of West Virginia, in the enactment and proposed enforcement of the said pretended law, is violating the provisions of the United States constitution, which vests in the Congress the power to regulate commerce, among the several states, and also the provisions of section 10 of article I of the said constitution of the United States, which forbids any state from making or enforcing any law which violates or impairs the obligation of contracts and also the provisions of the fourteenth amendment to the United States constitution which forbids the several states from depriving persons of property without due process of law and of the equal protection of the laws.

Wherefore your orator charges:

1. That such act, law or statute of West Virginia, hereto attached and marked Exhibit "B," will prevent the transportation of natural gas in interstate commerce and the carriage of gas through the pipe lines from the state of West Virginia into and for sale to the said state of Ohio and other states, as aforesaid, and is absolutely, unconditionally and utterly null and void, and without any force and effect whatever, because by the provisions of the constitution of the United States, hereinbefore referred to, the state of West Virginia can have no power, authority, dominion, control or jurisdiction over the transportation and carriage of natural gas from the state of West Virginia, to your orator, the state of Ohio, such transportation and carriage being wholly within the control, regulation, power, authority, jurisdiction and protection of the laws and constitution and courts and government of the United States of America and no other.

2. Any attempts by the defendant to carry out said act to prevent the transportation of natural gas outside of the state of West Virginia, would be a gross wrong against your orator's rights and property, as well as the rights, property, health,

convenience and safety of millions of the citizens and residents of your orator, and would work it and them a great and irreparable loss and injury for which it or they would have no adequate remedy at law.

In consideration whereof, and for as much as your orator and its citizens and residents, who except through representation by your orator, have no remedy and can only have adequate relief in this honorable court, your orator on its own behalf and also as the *parens patriae*, trustee, guardian and representative of that great proportion of its citizens, who are directly affected by the provisions of said law, as aforesaid, prays this honorable court to take cognizance of the several charges set forth in the premises.

Wherefore your orator, needing relief, prays:

1. That the said state of West Virginia may be made defendant to this bill of complaint and that it may be compelled to answer each and every allegation therein contained, but not under oath, the answer under oath being expressly waived.

2. That it be adjudged and decreed that said act or law of 1919, of the state of West Virginia, Exhibit "B" herein, is illegal and void because it conflicts with, and contravenes clause 3 of section 8 of article I of the constitution of the United States granting to Congress the power to regulate commerce between the states, in that it purports to give to the public service commission of the state of West Virginia, the right to inhibit the exportation of an article of interstate commerce; and of the fourteenth amendment of the constitution of the United States, in that it abridges the privileges and immunities of the residents and citizens of your orator, the state of Ohio, who are also residents and citizens of the United States, and the state of Ohio itself, by depriving them and it of their property without due process of law, and denying to them and it the equal protection of the law; and of section 10 of article I of the constitution of the United States, in that it impairs the obligation of contracts of your orator, the state of Ohio, and of the citizens and residents of your orator.

3. That it be adjudged and decreed that neither your orator nor any of its citizens and residents have an adequate remedy at law for the injury which would result from the enforcement of said act and that such injury would be irreparable.

4. That the said defendant may be restrained from committing any of the acts and deeds herein complained of and from any violation of the rights of your orator or of its citizens and residents in the premises, by a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendant, its respective agents, servants, attorneys, workmen and employes, from in any way interfering with the transportation of natural gas from and out of the state of West Virginia, for use in the state of Ohio by your orator or any of its citizens or residents, under the authority of the said act, law or statute, Exhibit "B," or any act, law or statute of the state of West Virginia, or under any pretended common law, right, rule of action, or unwritten law of the state of West Virginia.

5. That a provisional or preliminary injunction be issued forthwith, restraining the said defendant, its respective officers, agents, servants, attorneys, workmen and employes, from in any way interfering with the transportation of natural gas from and out of the state of West Virginia, into and for use in the state of Ohio by your orator, or any of its citizens or residents; and from instituting, prosecuting or conducting any suits, and from suing out any writs of process in any of the state courts of West Virginia, against any person, company or corporation which is engaged in the production or transportation of natural gas out of the state of West Virginia and into the state of Ohio, for use by your orator or any of its citizens or residents, under the authority of the said act, law or statute, Exhibit "B."

6. That said defendant be decreed to pay the costs of this suit.

7. That this honorable court may grant your orator such other and further relief as the equity of the case may require,

whether specifically prayed for herein or not, and which to your honors may seem meet.

8. That it may please your honors to grant unto your orator not only a writ of injunction, conformable to the prayer of this bill, but also that a writ of subpoena of the United States of America be issued out of and under the seal of this court, directed to the state of West Virginia, to be served upon its governor and attorney general, commanding said defendant on a certain day to be therein named, and under a certain penalty, to be and appear before this honorable court, and then and there to answer, but not under oath, answer under oath being hereby waived, all and singular the premises, and to stand to, perform, and abide such order, direction and decree as may be made against said defendant in the premises and as may be required by the principles of law, equity and good conscience.

And your orator will ever pray.

THE STATE OF OHIO.

By JOHN G. PRICE,
Attorney General.

[*Verification.*]

(1) From the record in 252 U. S. 563, 64 L. ed. —.

No. 2108.

Subpoena in a Suit by One State Against Another.(1)

[*Caption.*]

The President of the United States to the Governor and Attorney-General of the State of —, Greeting:

For certain causes offered before the supreme court of the United States holding jurisdiction in equity, you are hereby commanded, and strictly enjoined that, laying all matters aside and notwithstanding any excuse, you personally be and appear on behalf of the people of said state of — before the said supreme court holding jurisdiction in equity, on the first Monday in — next, at the city of Washington, in the District of Columbia, being the present seat of the national government

of the United States, to answer concerning things which shall then and there be objected to said state, and to do further, and receive on behalf of said state, what the said supreme court holding jurisdiction in equity shall have considered in this behalf; and this you may in no wise omit, under the penalty of — dollars.

Witness the Honorable Melville W. Fuller, chief justice of the said supreme court, at Washington City, this — day of —, 1894.

S. G.,

[Seal.]

Clerk of the Supreme Court.

(1) When a bill has been filed the defendant state will be served with process, but no coercive measures will be employed to compel appearance. In default of appearance the case will be heard *ex parte*. Rhode Island *v.* Mass., 12 Pet. 761; Supreme Court Rule No. 5. In New Jersey *v.* New York, 5 Pet. 284, 8 L. Ed. 127, procedure in these cases of original jurisdiction receives some attention.

No. 2109.

Return of Service of Subpoena on a State.(1)

[Caption.]

The within subpoena was served upon J. K., governor of the state of —, at —, on the — day of —, 1894, by delivering to and leaving with him a copy thereof, and at the same time showing him the original with the seal of the court attached; also, on L. M., attorney-general of said state, at —, on the — day of —, 1894, by delivering to him a copy thereof, and at the same time showing him this original with the seal of the court attached.

H. C.,

Dated —.

United States Marshal.

(1) In case of service by copy see Equity Rule 13.

No. 2110.

Motion to Dismiss for Want of Jurisdiction.(1)

n the Supreme Court of the United States.

The State of —, Plaintiff,

vs.

The State of —, Defendant.

Now comes the defendant and moves the court to dismiss

the bill herein for want of jurisdiction, as apparent from the bill:

First. Because it therein appears that the claim relates to an antiquated controversy between colonies, previous to the formation of the government.

Second. Because there is no legislative provision or law in force to direct or regulate the process, forms of proceeding, judgment, or execution, or to authorize any action by the court in the premises.

Third. Because the nature of the suit is political in its character, brought by a sovereign for the restitution of sovereignty of disputed territory.

R. X.,

Solicitor for Defendant.

(1) The matter of jurisdiction takes precedence over an inquiry into the merits. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935; and the court will suo motu look into the question, regardless of the attitude of the parties. *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

The original jurisdiction of the Supreme Court over controversies between states includes not only the power to render judgment but also to enforce it by appropriate remedial processes. *Virginia v. W. Va.*, 246 U. S. 565, 593 to 606, 62 L. Ed. 883, and for the course of the interesting litigation between these two states to enforce the contract distributing and assuming the debt of Virginia at the time of the separation of West Virginia, see 11 Wall. 39, 102 U. S. 674, 206 U. S. 290, 209 U. S. 514, 220 U. S. 1, 222 U. S. 17, 231 U. S. 89, 234 U. S. 117 (resume in this case); 238 U. S. 202, 241 U. S. 531, 246 U. S. 565 (largely devoted to a discussion of the jurisdiction of the court to enforce its judgment and the jurisdiction of Congress in the creation of remedies, and setting down several questions for later argument). There appears all through this litigation the greatest consideration by the court for the character of the parties.

In 246 U. S. 565, *Va. v. W. Va.*, at pages 567 to 579, appear:

(a) Petition by Virginia for writ of mandamus and an order directed to the state of West Virginia and the members of her legislature, requiring them to show cause why the writ should not issue commanding the levy of a tax to satisfy the judgment theretofore recovered against the state of West Virginia. The motion was granted and the rule was issued, and

(b) Motion of West Virginia to discharge the rule.

No. 2111.

Demurrer for Want of Jurisdiction.

Demurrers are abolished by Equity Rule 29.

No. 2112.**Plea.**

Pleas are abolished by Equity Rule 29.

No. 2113.**Replication by Plaintiff in Suit Between States to Settle
Boundary.(1)**

Now comes this replicant, the state of Missouri, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, the state of Nebraska, for replication thereunto saith that it doth and will ever aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant; that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant.

Plaintiff denies that the Act of Congress of June 7, 1836, extended the boundary line between this plaintiff and defendant only to the water's edge of the Missouri river, as it then ran, but avers the fact to be as stated in plaintiff's bill of complaint herein.

Plaintiff denies that the changes which the channel of the Missouri river at the point referred to in plaintiff's bill of complaint was continually undergoing at the time and for a long time after, plaintiff and defendant were admitted into the union, were small, and such as the channel of said river is constantly undergoing, and avers the changes in the channel of said river to be as charged in the bill of complaint herein.

Plaintiff denies that the boundary lines between said states

were at any time prior to the spring of 1876 permanently fixed, or capable of being correctly located; denies that the center of the middle channel of the Missouri river in the one case, and the water's edge of said river in the other case is now or ever was the boundary line between said states of Nebraska and Missouri, but avers the truth to be as alleged in plaintiff's bill of complaint herein.

Plaintiff denies that there was on the 5th day of July, 1867, or on any other date or dates, subsequent to the admission of the state of Nebraska into the union, a sudden change in the channel of said Missouri river at the point mentioned in defendant's said answer, but avers the fact to be that said river assumed its present course and channel as in the bill of complaint stated.

Plaintiff denies that Exhibit "A," filed by defendant and attached to its answer herein, is a true copy of the original government plat made under the direction of the surveyor general of the United States, and now on file in the surveyor general's office at Leavenworth, Kansas, of a part of the land described in plaintiff's bill as shown on plaintiff's Exhibit "A" as "McKissick's Island," as the same existed at the time of the admission of defendant into the union; denies that the space on defendant's said Exhibit "A," marked "Missouri River," commencing at a point near the center of the north line of the northwest quarter of the northwest quarter of section 2, township 6, north range 15 east of the 6th P. M., and running thence in its meanderings northeast, northwest, northeast, east, southeast, south, southwest as west, as indicated by the representation of the arrow appearing in said space in said exhibit, indicates the course of the Missouri river as it flowed along the sides of "McKissick's Island" at the time of defendant's admission into the union.

Plaintiff further replying denies that on or about the 5th day of July, 1867, or at any other time subsequent to the admission of defendant into the union, the Missouri river, aided by the digging of a ditch, by any person whomsoever, across

"McKissick's Island," as described in defendant's answer, or at any other place or point, suddenly changed its channel or formed a new channel where it has ever since, and does now run, but avers the fact to be that said channel located itself as it now exists and runs in the manner as described in plaintiff's bill of complaint.

Plaintiff further replying denies that defendant's Exhibit "C," which is made a part of its answer, is a true copy of a subdivision plat and notes made by the authority of the board of county commissioners of Nemaha county, Nebraska, and by the authority of Atchison county, Missouri, and filed on the 10th day of April, 1895, in the office of county clerk of said Nemaha county, Nebraska; denies that said alleged plat and notes were made after a survey of said island of "McKissick," and said relict mentioned in defendant's answer, under authority by J. M. Hacker, county surveyor of Nemaha county, Nebraska, in connection, first, with B. F. Rummerfield, county surveyor of Atchison county, Missouri, and second, in connection with D. A. Quick, county surveyor of Atchison county, Missouri, the successor in office to the said B. F. Rummerfield; denies that said survey, plat and notes were ever at any time made by any person or persons possessing authority so to do, or to bind this plaintiff thereby.

Plaintiff further replying denies the correctness of defendant's several exhibits; denies that the true boundary line between said states at the points mentioned in the bill of complaint and answer is as stated in said answer. Denies that the Nishnabotona river, which flows southwest across the state line dividing Iowa from Missouri at a point about the center of the north line of the northwest fourth of section 35, township 67, range 42 west of 5th P. M., thence according to its meanderings southwest to a point near the center of the northwest fourth of section 10, township 66, range 42, aforesaid, changed its course on or about the 5th day of July, 1867, or at any other time, by cutting through the land which had separated it from the old channel of the Missouri river; denies that

said Nishnabatona river now or ever has flowed through said old channel of the Missouri river; and denies that said Nishnabatona river now forms or at any time has formed the boundary line for this plaintiff between the point where it enters the old channel and where it enters the Missouri river as it now runs.

Plaintiff further replying states that as to whether, as alleged in defendant's answer, that all the inhabitants in that part of land described in plaintiff's bill of complaint and known as "McKissick's Island," and the relict of the old channel of the Missouri river, as alleged in and as it appears on defendant's Exhibit "C," submit to and always have submitted to the jurisdiction of the state of Nebraska, and that said island and that said relict are known as Island Precinct of the county of Nemaha, and that at all times all of the inhabitants of said precinct who were entitled to vote and who did vote, cast their votes in said county of Nemaha, state of Nebraska, and for a great many years last past citizens have been drawn from the body of said inhabitants to serve on juries in the District Courts of said county, and that the chain of title comprising all the boundaries of said county and including said relict is recorded in the office of the register of deeds of said Nemaha county, and that the transfers of land known by the owner of said lands to be situated within said island and the boundary of said relict are recorded within said county, this plaintiff has no sufficient information upon which to form a belief and therefore, denies the same.

Plaintiff further replying denies that defendant as alleged in its answer is and always has been since its admission into the union entitled to the jurisdiction over said island and said relict, by the act of Congress admitting said defendant into the union; and that all other matters and things in said answer contained material and effectual in the law to be replied unto and not herein well and sufficiently replied unto or admitted are denied as untrue; all of which matters and things this replicant is ready to aver, maintain and prove as this honorable

court shall direct, and humbly prays as in and by its said bill it hath already prayed.

_____,
Solicitor for Plaintiff.

(1) Under Equity Rule 31, a reply is not proper without leave of court unless the answer includes a set-off or counterclaim.

No. 2113a.

Motion for Leave to File Replication.

IN THE SUPREME COURT OF THE UNITED STATES
SITTING IN EQUITY

No. 34, Original, October Term, 1918

The State of Ohio, Complainant,

vs.

The State of West Virginia, Defendant.

The complainant, the state of Ohio, asks leave of this court to file the general replication herewith submitted, copy whereof and notice of this application to file same having been given to and accepted by said defendant.

JOHN G. PRICE,
Attorney-General,
FREEMAN T. EAGLESON,
R. G. ALTISER,
EDWARD E. CORN,
BERT W. GEARHEART,
ROBERT J. ODELL,
Solicitors for Complainant.

No. 2114.

**Replication to the Original Answer, and Answer to the
Counter-claim of the State of Texas.(1)**

IN THE SUPREME COURT OF THE UNITED STATES
No. 23, Original, October Term, 1920

The State of Oklahoma, Plaintiff,

vs.

State of Texas, Defendant; United States of America, Inter-
vener.

REPLICATION

The complainant, the state of Oklahoma, for its replication to the original answer of the state of Texas filed in the above entitled cause, does aver and say:

1st. That it is advised, and so alleges, that paragraphs 1 to 16, both inclusive, which are found on pages 1 to the middle of page 10, inclusive, of the printed answer of the state of Texas, simply constitute denial of the allegations of the original bill of complaint filed in this court by the state of Oklahoma, and that the same do not allege any new matter to which the complainant deems it necessary to reply or answer in detail, but said complainant says that if the court should find any of said allegations in said pages 1 to 16, both inclusive, to contain any new matter which is inconsistent with the allegations of plaintiff's original bill of complaint, then the said complainant, the state of Oklahoma, hereby expressly denies all of such allegations.

2nd. Said complainant, the state of Oklahoma, further replying to the original answer of the defendant, the state of Texas, and more particularly to subdivision 2 of said answer, the same being found on the last half of page 10, pages 11, 12 and 13 of the printed answer of said defendant, says that it denies the allegations contained in said subdivision 2 of said answer, and denies that it was understood between the United States and Spain, as such understanding was embodied in the

treaty between the United States and Spain under date of February 22, 1819, that the boundary line between that part of the then domain of Spain which now constitutes the state of Texas and the United States should be fixed at the center of the main channel of Red River as it then existed, and denies specifically the conclusions reached by the defendant, the state of Texas, as set forth in its answer in the last paragraph thereof on page 13, that the center of the main channel of Red River became the boundary line between the then state of Texas and the now state of Oklahoma.

3rd. Said complainant, the state of Oklahoma, further replying to subdivision 3 of the original answer of the state of Texas, as found on pages 14, 15, 16, and down to subdivision 4 on page 17 of printed answer of said defendant, specifically denies the allegations of said subdivision 3 of said answer, and more particularly denies that the state of Texas has maintained continuous, quiet, peaceful, and uninterrupted possession thereof for more than eighty years and up to January, 1919, as set forth at the top of page 16 of the defendant's answer, and denies that the United States of America or the state of Oklahoma has acquiesced in such alleged exclusive possession by the state of Texas during such period, but alleges that the United States of America, prior to the admission of the state of Oklahoma into the Union of States, on November 16, 1907, asserted and claimed jurisdiction over all that portion of the bed of Red River which now forms the boundary line between the state of Oklahoma and the state of Texas; and the said complainant, further replying, states that the state of Oklahoma has not only not acquiesced in any continuous, quiet, peaceful and uninterrupted possession of the south half of said Red River for more than eighty years, but that it has, at all times since its admission into the Union of States, asserted and claimed civil, criminal and political jurisdiction over the entire bed of Red River whenever there was any cause or occasion to assert such claim; that, as evidence thereof, said complainant, the state of Oklahoma, states that there are many interstate

railroads passing from the state of Oklahoma into the state of Texas and crossing Red River east of the hundredth meridian of west longitude and the southeast corner of the state of Oklahoma, and that the state of Oklahoma, through her authorized taxing authorities has at all times taxed said interstate railroad bridges, with one possible exception, for their entire length across Red River and the south bank thereof, and that said railroads have continuously and from year to year paid taxes on said interstate bridges for their entire length across Red River and to the south bank thereof to the state of Oklahoma; and complainant further states that the state of Texas has at no time assessed, levied, or attempted to assess, levy, or collect any taxes upon any of said interstate railroad bridges north of the south bank of Red River which had been taxed by the state of Oklahoma, but has at all times acquiesced in the exclusive taxing of said interstate railroad bridges by the state of Oklahoma.

Complainant further says that the various officers of the state of Oklahoma, including the county assessors, the sheriffs, and the peace officers of the United States, have on frequent occasions, covering a period of many years prior to January 1, 1919, exercised civil and criminal jurisdiction to the south bank of Red River; that they have frequently made arrests in criminal cases on the south half of said river bed and have captured automobiles and cars transporting intoxicating liquors and have filed libel proceedings against the same and confiscated said automobiles and cars in the appropriate courts of the state of Oklahoma, all with the knowledge and acquiescence of the state of Texas as defendant herein.

Complainant further states that, in some instances, and more particularly with reference to the M., O. & G. Railway Company of Texas, the same being an interstate railroad passing between the state of Oklahoma and the state of Texas, it has sought to issue bonds upon its property in the state of Texas, and, upon proper application thereof to the railway commission of Texas, said commission being the proper tribunal of the

state of Texas for such purpose, said commission supervised the measuring of the mileage of said railroad in the state of Texas for the purpose of issuing bonds, and for that purpose commenced the measurement of said mileage at the south bank of Red River in Grayson county, Texas; and said complainant further says that the said M., O. & G. Railway Company issued bonds in the the state of Oklahoma and pledged its mileage to the payment thereof, which included all the mileage in the state of Oklahoma to the south bank of Red River.

Complainant further states that the state of Oklahoma, in numerous instances, which complainant is advised it is not necessary to plead in detail in this reply, has exercised acts of sovereignty, civil, political, and criminal, over the territory embraced in the south half of Red River along the southern part of the state of Oklahoma, and that such acts have been done with the knowledge, consent, and acquiescence of the defendant, the state of Texas; and complainant specifically denies that the center of the main channel of Red River has by prescription become the boundary line between the state of Oklahoma and the state of Texas, as alleged in the last paragraph of subdivision 3 of the said defendant's answer, as found on page 17 thereof.

4th. Said complainant, the state of Oklahoma, replying to subdivision 4 of the defendant's, the state of Texas, answer, found at the bottom of page 17 and pages 18, 19, 20, 21, 22, and the top of page 23 of the printed copy thereof, says that it denies specifically that it was not the intention of this court, in the case of United States vs. The State of Texas, 162 U. S., 1, and commonly known as the Greer county case, to fix the boundary between the land embraced in Greer county and the state of Texas, and denies specifically that said decree of the court was *obiter dictum* and was not intended to fix the boundary line along any portion of said boundary at the south bank of the said Red River; but complainant specifically says that the issue in said cause was the determination of the boundary line between the state of Texas and the then Indian territory

to determine whether the county of Greer was a part of the state of Texas or property of the United States; that in determining said question it was necessary for said court to construe the treaty between the United States and Spain entered into February 22, 1819, which treaty fixed the boundary line between the state of Oklahoma throughout the course of Red River from the hundredth meridian to the southeast corner of the state of Oklahoma, and that, in the consideration of said treaty, the court found, adjudged, and decreed that the same fixed the boundary line between the state of Texas and Greer county as the south bank of Red River, and that said decree was, therefore, an adjudication of the correct boundary line between the state of Oklahoma and the state of Texas as affecting the Red River.

5th. The complainant herein, the state of Oklahoma, answering subdivision 5 of the answer of the state of Texas, denominated in said answer as "summary of the defendant's contentions," found on the bottom of page 23 and the top of page 24 of the printed bill, denies the conclusion reached by said defendant.

6th. *Answer of Complainant to the Counter-claim of Defendant.*

For answer to the counter-claim of the defendant herein, the complainant, the state of Oklahoma, saving and reserving unto herself the benefit of all exceptions to the errors and imperfections in said counter-claim contained, for answer thereto or to so much thereof as she is advised it is necessary or material for her to answer, does aver and say:

That the treaties, decisions, and congressional enactments pleaded by the defendant are substantially correct, but that it is necessary to consider other congressional enactments, acts of the United States, the state of Oklahoma, the state of Texas, and judicial decisions of this court to ascertain and determine the true boundary between Oklahoma and Texas from the point where the said 100th meridian crosses Red River to the point where it intersects the parallel of 36° 30' north latitude.

Further answering the counter-claim of the defendant, complainant says that following the treaty of 1819 between the United States and Spain, the treaty of 1828 between the United States and Mexico, and the treaty of 1838 between the United States and the Republic of Texas, a part of the boundary line between Texas and the United States was fixed as "following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence due north to the river Arkansas"; that Texas was admitted into the Union in 1845; that by an act of Congress approved September 9, 1850, it was proposed to the state of Texas "that her boundary on the north shall commence at the point at which the meridian 100 west from Greenwich is intersected by the parallel $36^{\circ} 30'$ north latitude, and shall run from said point due west from Greenwich, etc."; that the state of Texas, by an act of her legislature approved November 5, 1850, accepted the proposition of the United States as stated in the act of Congress approved September 9, 1850.

Complainant admits that the line has never been surveyed by a joint commission, but says that on October 13, 1857, the commissioner of Indian affairs for the United States entered into a contract with A. H. Jones and H. M. C. Brown, United States surveyors, to establish the west boundary of the Choctaw and Chickasaw countries of the Indian territory, which was designated as the 100th meridian of longitude west from Greenwich. The longitude of this initial point on Red River was determined by astronomical observations conducted by Daniel G. Major, astronomer and United States surveyor, in 1859. The point so determined and fixed was by the said Jones and Brown confirmed as the point where the 100th meridian of west longitude from Greenwich crosses Red River, and from which point they surveyed northward for a distance of 109 miles 56.54 chains from Red River, setting monuments at intervals of one mile.

The complainant further says that by an act of Congress approved June 5, 1858 (11 Stat., 310), provision was made for the establishing of the boundary line between the territories of the United States and Texas, under which provision the duly appointed authorities of the United States appointed John H. Clark as United States commissioner for the survey of part of the boundaries of Texas, including the 100th meridian, as follows:

"Beginning at the point where the 100th degree of longitude west from Greenwich crosses Red River, and running thence north to the point where said 100th degree of longitude intersects the parallel of $36^{\circ} 30'$ north latitude."

The point where the 100th degree of longitude west from Greenwich crosses Red River and the line northward where the said 100th degree of longitude intersects the parallel of $36^{\circ} 30'$ so determined, fixed and located by A. H. Jones, H. M. C. Brown, and by J. H. Clark, was approved by the United States on the 27th of April, 1860, and Mr. William H. Russell, commissioner of boundary survey of Texas, in his report to the governor of Texas, referring to the 100th degree of longitude as determined by the aforesaid surveyors of the United States, said, "It would be proper to show here that the 100th degree of longitude is correct." And in the same report, referring to the parallel of $36^{\circ} 30'$, Commissioner Russell said, "Arriving at the parallel $36^{\circ} 30'$ on the evening of the 19th of June I found the intersection with the 100th meridian forming the northeast corner of the 'Panhandle' had been determined and fixed by the United States party. I accepted this point as established, because there could be no possible doubt of its correctness, as the observations were made with a very valuable and costly zenith telescope for the space of near one week."

The complainant further says that as stated in the counterclaim of the defendant the Commissioner of the General Land Office of the United States, under and by virtue of an act of Congress approved January 15, 1901, directed Arthur D. Kid-

der to determine, fix and establish the intersection of the 100th meridian with Red River, and that the said Arthur D. Kidder made observations and calculations for the establishment of said point and did establish what he considered the true 100th meridian, which according to the information of the complainant is 3699.7 feet east of the location made by the said Jones, Brown, and Clark, heretofore set out.

The complainant says that no other or further action was ever taken by the Congress of the United States concerning the survey made by the said Arthur D. Kidder and that the same is not in any way binding upon the complainant, the state of Oklahoma, but says that the line so determined and fixed by Jones, Brown and Clark, heretofore described, became, was and is binding upon all parties for the following reasons:

First. The said line so run, determined and fixed by Jones, Brown, and Clark was approved and accepted by the United States and has been relied upon continuously since 1860 by the executive officers of the United States. Under the provision of section 453 of the Revised Statutes, it is made the duty of the commissioner of the general land office to perform, under direction of the Secretary of the Interior, all executive duties concerning the surveying and sale of the public lands of the United States and to issue patents for all grants of land under the authority of the government. Acting under and by virtue of this authority the interior department, in the years 1872 and 1875, surveyed all the lands east of the 100th meridian as determined and fixed by the surveys of Jones, Brown, and Clark, and regarded the line so fixed and determined by them as the permanent boundary. The plats of all fractional townships adjoining the meridian on the east were approved and the lands afterwards opened to entry, in the full confidence and belief of the government that the 100th meridian had been correctly established and that the line as thus marked upon the ground would forever remain unchangeable. Substantially all of the fractional subdivisions situated

east of the meridian as thus fixed, determined and considered, passed into private ownership. Complainant states upon information and belief that of the strip of land involved in the counter-claim of the defendant 23,775 acres have been finally disposed of by the United States, leaving 118 acres of vacant land and 313 acres in pending entries. The estimated area of the strip, according to the information and belief of complainant, consists of 24,206 acres. Complainant states that relying upon the boundary line as so fixed the government collected large sums of money in fees and commissions from the purchasers of said land.

Second. And the complainant further says that said line so determined, indicated and fixed by Jones, Brown, and Clark was recognized by the government of the United States in the admission of Oklahoma as a state, and has been relied and acted upon by the state of Oklahoma at all times since her admission as a state; that ever since her admission as a state she has assessed, levied, and collected taxes upon all personal and real property east of said line and extended and applied her laws both civil and criminal, over all of said territory, openly, adversely, notoriously, and without interference on the part of Texas or any other power; that the inhabitants and citizens of said territory have ever considered themselves as citizens of Oklahoma, voting in her elections, amenable to and protected by her laws.

Third. The legislative branch of the United States government has recognized the line as determined by the United States surveyors, Jones, Brown, and John H. Clark, and has made provision for remarking portions of said line in their original positions as controlled by evidence of original monuments. In the act of Congress approved March 3, 1891 (26 Stat., 948-971), provision was made for dividing "No Man's Land" in northwest Oklahoma, situated north of parallel 36° 30' as follows:

"* * * and out of the sum herein appropriated for surveying the public lands the Commissioner of the General Land

Office, with the approval of the Secretary of the Interior, may assign a sum sufficient to complete the survey known as No Man's Land—and the boundary line between said public land strip and Texas, and between Texas and New Mexico, established under the act of June five, eighteen hundred fifty eight, is hereby confirmed."

And again, in the act of February 16, 1911 (36 Stat., 1454), this line was confirmed as follows:

"Joint resolution reaffirming the boundary line between Texas and the territory of New Mexico." * * *

Fourth. That said line so determined and fixed by Jones, Brown, and John H. Clark, aforesaid, was accepted by the state of Texas, and recognized by her in the construction of counties on the western side of and adjoining said line, and from 1860 until 1907 she recognized the ownership and jurisdiction of the United States of and in said territory east of said line, and since 1907 has recognized the jurisdiction of the state of Oklahoma over said territory: And having thus continuously, over a period of sixty years, failed and refused to assert any claim of ownership or jurisdiction is estopped from asserting said claim at this time.

The actions of the states of Oklahoma and Texas and the United States above set out was recognized and confirmed by this court in the Greer County case, 162 U. S., 1. The primary issue in this case related to the river boundary, but the question was raised and in deciding the boundary controversy it became necessary to decide, determine, and identify the 100th meridian, and to construe the treaty of February 22, 1819, between the United States and Spain (8 Stat., 252), and construing the treaty the court said: * * *

Fifth. And complainant further answering says that by the act of Congress of 1850, accepted by Texas November 5, 1850, the northern boundary of Texas commences where the 100th meridian intersects the parallel of 36° 30' of north latitude. By the second section of the act, Texas ceded to the United States all claims exterior to the limits defined in the first article

of the act, and complainant asserts and alleges that if she ever had any color of title to the territory north of Red River and east of the true 100th meridian she wholly divested herself of it and relinquished it by this act. Thereafter she sat silent while the United States made leases of said territory and treaties with various Indian tribes touching this very soil; she witnessed without protest the organization of Kansas as a territory in 1854 and her admission into the Union as a state in 1861; she witnessed the organization of Colorado as a territory and her admission as a state, the organization of New Mexico and Oklahoma as territories and their admission as states to the Union, and complainant asserts that this court has held concerning "the public land strip" which is a part of this territory that it ceased to be a part of Texas by virtue of this act of cession. *Cook v. United States*, 138 U. S., 157.

Sixth. And the complainant further answering the counterclaim of the defendant says that this court has in *U. S. v. Texas*, 143 U. S., 621, and 162 U. S., 1, determined against the state of Texas all the questions raised in this case. In 1890 the Attorney General of the United States, acting under the provisions of an act of Congress approved May 2, 1890, filed an original bill in this court "to the end and for the purpose of determining and settling the true boundary line between the United States and the state of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town fork or the north fork of Red River as aforesaid constitutes the true boundary line of the treaty of 1819 aforesaid, and whether the tract or parcel of land lying and being between the two said streams and called by the authorities of the state of Texas 'Greer county,' is within the boundary and jurisdiction of the United States or of the state of Texas."

And in the brief filed in this court on December 8, 1891, by the Attorney General of the United States it is stated in the first sentence thereof, "the original bill in this cause was

filed in October, 1890, for the purpose of securing settlement of a long-continued controversy as to what constitutes the true boundary line between the United States and the state of Texas under the treaty of 1819 between the United States and Spain, to which respondent filed a demurrer and answer."

The purposes as thus alleged in the bill were recognized by the state of Texas and demurrer and answer filed thereto, the first ground of demurrer stating:

"That it appears by the complainant's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, in that complainant seeks by her said bill to obtain from this court a decree judicially settling and determining the true boundary line between the United States of America and the state of Texas, which question is political in its nature and character and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the constitution and laws of the United States."

And in the third ground of demurrer filed by the defendant this language is found:

"That it appears by the terms of complainant's bill filed in this cause that the complainant claims as the boundary line between the United States of America and the state of Texas, the following designated calls, to wit: 'Begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River, and running thence by a line due north to the river Arkansas, thence following the course of the southern bank of the Arkansas to its source in latitude 42 north; thence by that parallel of latitude to the South Sea, * * *."

And on page 16 of the answer filed by Texas she urged her claim to the territory from the point of the 100th meridian,

according to Melish's map, north to the forty-second parallel, as follows:

"That the line of said 100th meridian of longitude west from London is laid down in said map of Melish, intersecting the Rio Roxo or Red River, a distance of many miles east of what is claimed by complainant to be the true line of said meridian, and many miles east of the point where the Ketcheaquehono empties its waters into the Rio Roxo of the treaty; and said meridian so laid down on Melish's map and extended north to the forty-second parallel of north latitude includes as territory properly belonging and conceded to Spain under the terms of the treaty, but belonging of right to Texas by virtue of establishment of her independence, a large part of the lands now belonging to the Chickasaw and other tribes of Indians under concessions by treaty, as well as a portion of the present states of Kansas and of Colorado and a part of the territory of New México."

And in the brief filed in this court on December 8, 1891, signed by A. H. Garland, George Clark, H. J. May, and C. A. Culbertson, attorney general of Texas, all solicitors for the defendant, on pages 8-9 is found the following language:

"The first ground of demurrer is 'that it appears by the complainant's own showing by the said bill that she is not entitled to the relief prayed in the bill against this defendant, in that complainant seeks by her said bill to obtain from this court a decree judicially settling and determining the true boundary line between the United States of America and the state of Texas, which question is political in its nature and character and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the constitution and laws of the United States.'

"It will be observed that this demurrer suggests not only that the question is in its nature political but that, contrary to the rule governing controversies between two states of the Union, it is such a political question that this court can not

judicially determine it in the exercise of the jurisdiction conferred by the constitution. That a controversy respecting the boundary between two independent nations is a political and not a judicial question is well settled."

And in the brief that Texas filed February 2, 1895, signed by the same solicitors for Texas as above, referring to this controversy between the United States and Texas, it is stated on page 1 as follows:

"It is a contest to judicially determine the boundary between the United States and Texas in which the right to Greer county, Texas, containing over a million and a half acres of land is involved."

And after consideration of the bill, demurrer and answer, the briefs and arguments of the parties, and the entire record, this court said, in the syllabus, in *United States v. Texas*, 143 U. S., 621: * * *

And in the body of the opinion it is said:

"The relief sought by the bill was the 'determining and settling the true boundary line between the United States and the state of Texas and to determine and put at rest questions which now exist as to whether the Prairie Dog Town Fork or the North Fork of Red River as aforesaid constitutes the true boundary line of the treaty of 1819.' "

And on page 637 the court said:

"The relief asked is a decree determining the true line between the United States and Texas and whether the land constituting what is called 'Greer County' is within the boundary and jurisdiction of the United States or the state of Texas."

And on page 646 the court said:

"We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas."

Having overruled the demurrer in the case of *United States v. Texas*, 143 U. S., 621, the case came on for hearing on the

merits of the boundary controversy, and after a careful and painstaking consideration of the treaty of 1819 between the United States and Spain, the exhaustive briefs and voluminous record filed therein, the court held that the south bank of Red River constituted the boundary line between the United States and Texas; that the 100th meridian as fixed and determined by the surveys of Jones, Brown, and John H. Clark was the true 100th meridian; that the line from this point northward to the point where it intersected the parallel of $36^{\circ} 30'$ north latitude was the true line; that Texas had acquiesced in said boundary line in the formation of her counties on the west side of said line, and determined every question raised by the pleadings and the evidence, including the entire boundary line between the parties, against the state of Texas.

And the complainant says that in said case in the brief filed February 27, 1895, and signed by Charles A. Culbertson, George R. Freeman, and M. M. Crane, of counsel for the defendant, the state of Texas, it was urged upon the court, on page 54 of said brief, as follows:

"Should the court determine all questions submitted against the state of Texas, including that of estoppel, there certainly can be no doubt of the right of defendant to insist that the intersection of the 100th meridian with the river be accurately fixed. That has been done by Professor H. S. Pritchett (Record, pages 1194 *et seq.*), against whose conclusion not a syllable of testimony has been adduced, and the line should be established as found by him, 3,797.3 feet east of the initial monument placed by Messrs. Jones and Brown in 1858."

And the complainant says that the court having this survey of H. S. Pritchett before it, which survey locates the 100th meridian at another and different point than that located by the said Arthur S. Kidder, now urged by the state of Texas, refused to adopt said survey, but adopted the survey of Jones, Brown, and John H. Clark above set out as being the true 100th meridian.

The complainant contends, therefore, that the two decisions of this court above referred to constitute *res adjudicata*, controlling and decisive of this entire controversy.

And the complainant says that said judgment and decree became final; that the state of Texas in her petition for a rehearing did not challenge the opinion of the court on this feature of the case.

And the complainant says that the state of Oklahoma, because of the long, open, adverse and notorious possession and jurisdiction of the United States, and of the open, peaceable and adverse possession on her part, is the owner of said territory by the rules of prescription, and that she should have a decree dismissing the counterclaim of the defendant and declaring and establishing her sovereignty, ownership, and jurisdiction over the same.

And that this court grant the state of Oklahoma such other, further and general relief as it may be entitled to.

THE STATE OF OKLAHOMA,

By S. P. FREELING,

Attorney General.

(1) Taken from the record in 252 U. S. 372, 64 L. ed. —.

No. 2115.

Motion for Preliminary Injunction.

IN THE SUPREME COURT OF THE UNITED STATES

SITTING IN EQUITY

No. 34. Term, 1919

The State of Ohio, Plaintiff,

vs.

The State of West Virginia, Defendant.

If this court, in accordance with the motion made on May 5th instant, orders filed the Bill of Complaint in the above

stated suit, then complainant prays that, pending adjudication by this court, on the prayers of said complaint, the enforcement of the statute in controversy be enjoined since the operation thereof will prohibit the transportation of natural gas from West Virginia into Pennsylvania, Ohio, and other states, and will:

(a) Endanger the lives and affect the health of millions of the citizens of said states;

(b) Deprive them of comfort and convenience;

(c) Entail upon them great hardship and suffering;

(d) Cause them enormous property losses;

(e) Cause complainant great pecuniary damages;

and to avoid these calamities pending adjudication complainant prays that a preliminary injunction issue, as prayed for in said Bill of Complaint, to enjoin the enforcement of said statute until after this court shall have decided whether or not said statute shall go into effect.

Complainant has filed in support of this motion certain affidavits and refers to the averments of said Bill of Complaint and the Resolution of the Legislature.

Complainant states as further reasons why said preliminary injunction should issue the following:

1st. Fuel for the kitchen and home must be assured. The householder can not wait upon uncertainties: *e. g.*, until the gas is cut off or so greatly reduced in volume as to be practically useless. He dare not take that risk. Without said injunction he must therefore provide for other fuel before his rights are determined.

2nd. The same is true of the industrial consumers, but as to them money only is involved, while with the domestic consumer life and health are also involved.

3rd. If these changes in fuel appliances are once made, return to the use of gas can only be by destroying these new appliances and reinstalling gas-burning appliances.

4th. The cost of these perhaps unnecessary changes, depend-

ing on this court's adjudication, aggregates a stupendous sum—hundreds of millions of dollars.

5th. These changes when made will so reduce the demand upon the natural gas companies that it will destroy their business and render their plants of little value.

6th. When the change is made a readjustment of the domestic economy becomes necessary; this social revolution should only be entered upon when it becomes imperative.

7th. These direful effects upon life, health, comfort and convenience of millions of citizens and losses to property rights of hundreds of millions of dollars, should not be permitted until adjudication by this court holds that such ills and losses imposed by a state mistakenly pursuing its imaginary self-interest must be necessarily suffered under our constitutional form of government in the interests of society and as a burden to be borne to maintain social order and state rights.

Copies of the Bill of Complaint, motion for leave to file the same, and the memorandum brief in support of said motion, copies of this motion for a preliminary injunction, and of the affidavits in support thereof, have been served upon the Governor and Attorney General of the state of West Virginia on May 9th instant; also notice that this motion for a preliminary injunction and said supporting affidavits will be presented to this court on May 19th instant.

STATE OF OHIO,

By John G. Price, Attorney General.

EDWARD E. CORN,
BERT W. GEARHART,
ROBERT J. O'DELL,
Special Counsel.

FREEMAN T. EAGLESON,
R. G. ALTIZER,
Of Counsel.

No. 2116.

Motion for Reference To and Appointment of Special Master.

IN THE SUPREME COURT OF THE UNITED STATES.

SITTING IN EQUITY.

No. 23, Original, October Term, 1919.

The Commonwealth of Pennsylvania, Complainant,
vs.

The State of West Virginia, Defendant.

No. 24, Original, October Term, 1919.

The State of Ohio, Complainant,
vs.

The State of West Virginia, Defendant.

The complainants respectfully pray:

1st. That this Honorable Court will refer the above stated cases to a Special Master, to be hereafter designated and appointed, to take the proofs, ascertain and report to the court upon the material allegations and questions of fact put at issue by the pleadings; said master to have the same duties, power and authority given to masters appointed under the rules of equity prescribed by this court for the Circuit and District Courts of the United States.

2nd. That said cases be consolidated for the purpose of taking the proofs as above prayed, the evidence thus introduced to be considered as taken in both of said cases, the said master in each of said cases to ascertain and report upon the material allegations and questions of fact put at issue by the pleadings, which are alike applicable to both of said cases, and also to ascertain and report in the respective cases, upon those issues of fact raised by the pleadings therein, which are applicable solely to that case.

3rd. That the complainants and defendant, respectively, be required to make with the clerk of this court such amount of

deposits for fees, costs and expenses of the master and said clerk as they may from time to time be requested by said clerk.

WILLIAM I. SCHAFER,
Attorney General of Commonwealth of Pennsylvania.

JOHN G. PRICE,
Attorney General of State of Ohio.

[Counsel.]

No. 2117.

Motion on Behalf of the United States for Leave to Intervene.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 27, Original, October Term, 1919.

The State of Oklahoma, Complainant,

vs.

The State of Texas.

The attorney general, on behalf of the United States, moves the court for leave to intervene in the above entitled cause, and for that purpose to file therein its petition, a copy of which is attached hereto.

As cause for this motion it is shown:

1. The cause involves a controversy and conflict of jurisdiction between two states which affect the public tranquility and the interests of the United States and all the states of the union.

2. The cause involves the construction of a treaty of boundaries made between the United States and a foreign nation upon which depends property rights of the United States and of its Indian wards of great value and importance.

3. The cause involves conflicts of jurisdiction between the courts of two states, which conflicts hinder and embarrass the United States in the protection of its own property and that of its Indian wards.

A. MITCHELL PALMER,
Attorney General.

No. 2118.

Petition of Intervention on Behalf of the United States.(1)

IN THE SUPREME COURT OF THE UNITED STATES.

No. 27, Original, October Term, 1919.

The State of Oklahoma, Complainant,

vs.

The State of Texas.

Now comes the United States of America, by A. Mitchell Palmer, Attorney General, and by leave of the court first had and obtained, files this its petition of intervention in the above entitled cause, and alleges and shows as follows:

I. By the treaty of 1819 between the United States and Spain, the terms of which are sufficiently set out in the bill of complaint of the state of Oklahoma filed herein, the boundary between the two countries, from the point where the eastern boundary of the Spanish dominion touched the south bank of the Red river westward to the 100th degree of west longitude, was fixed and established at and along the south bank of the said Red river, and the islands and bed of the river were recognized and conceded to be, and were, the territory and property of the United States.

II. The boundary line so established was ratified and confirmed by the United Mexican States and by the Republic of Texas, and Texas was thereafter admitted into the Union with the said line as her northern boundary; all of which appears by the treaty of January 12, 1828, between the United States and Mexico; the treaty of April 28, 1838, between the United States and the Republic of Texas, and the joint resolution of the Congress of the United States of March 1, 1845, the acceptance thereof by Texas, and the joint resolution of Congress of December 29, 1845, admitting Texas into the Union. The said treaties and joint resolutions and the related public acts are sufficiently set out in the bill of the state of Oklahoma herein and by reference are made part hereof.

III. By the Act of May 2, 1890, 26 Stat. 81, 93, §§ 1, 29, the southern boundary of the territory of Oklahoma and the southern boundary of the diminished Indian territory were fixed and established at and along the northern boundary of the state of Texas; and subsequently, by the final decree of this court in the original suit brought herein by the United States against the state of Texas, under and in accordance with section 25 of the Act last above mentioned, it was adjudged and decreed that the tract of country bounded on the west by the 100th degree of west longitude and lying between the north and south Forks of the Red River, and then known as Greer county, was the sole and exclusive territory of the United States and that the boundary between said tract and the state of Texas was a line at and along the south bank of Red River and of the south, or Prairie Dog Town Fork of Red River, westward to the 100th degree of west longitude; and by the operation of said decree the said tract of country became a part of the territory of Oklahoma, and the same was a part of Oklahoma on her admission to the Union.

The name Red River will be used hereinafter as including the said south or Prairie Dog Town Fork, in accordance with the finding of this court in that cause.

Under the Enabling Act of June 16, 1906, 34 Stat. 267, and the acceptance thereof by a convention of the people affected (Revised Laws of Oklahoma, 1910, p. 211), all the territory embraced in the said territory of Oklahoma and the said diminished Indian territory was erected and constituted as the state of Oklahoma and said state was admitted into the Union (Proclamation of the President, November 16, 1907, 35 Stat., v. 2, p. 2160), and thereby the southern boundary of those territories became and is the southern boundary of the said state.

Wherefore this petitioner says that the boundary between the states of Texas and Oklahoma, from the point where the 100th degree of west longitude intersects the south bank of the Red River, to the eastern border of Oklahoma, is the line

of the south bank of the Red River, as the line of said south bank existed at the date of the ratification of the Treaty of 1819 between the United States and Spain; and the jurisdiction of the courts of the United States in the districts of Oklahoma extends on the south within their respective limits to the said boundary line.

IV. The Red River, from its sources in western Texas to and beyond the eastern boundary of Texas, is not now and never has been navigable in fact, and is not now and never has been a navigable stream within the purview of the laws of the United States.

V. At the date of the ratification of said Treaty of 1819 aforesaid, namely, on February 22, 1821, and for a long time thereafter, the United States was the owner in fee simple of substantially all the lands now included in the state of Oklahoma, subject only to the rights of occupancy of certain tribes and bands of Indians; and such ownership extended on the south to the line of the south bank of the Red River as it existed on said date. At various times since said Treaty the United States set apart portions of said lands as reservations for numerous other tribes and bands which removed thereto and occupied severally the reservations so assigned to them. Thereafter, in view of the progress made by said Indians in agriculture and the arts of civilization, the United States, with the assent of the tribes and bands affected, caused the lands of these reservations to be surveyed and in part allotted in severalty to individual Indians, reserving to itself, however, the title to such allotments for the protection and conservation of the interests of the allottees, but with an obligation, recognized by the laws and policy of Congress in that regard, to convey full and unrestricted title to the several allottees either at specified future dates or at such times as Congress or the President or the Secretary of the Interior shall find that the allottees respectively shall have become competent to manage their own affairs. Many such allotments have been made of tracts of land bordering upon the Red River, and

numerous other tracts similarly located have been sold by the United States to white settlers. Said allottees, as this petitioner is advised and believes, and so alleges, have acquired, by virtue of their allotments, rights of soil to a portion of the bed of the Red River in front thereof.

The United States is still the owner in fee simple in its own right and free from any lawful claims of Indian allottees or white purchasers of a large part of the bed of Red River and of numerous islands therein and of lands which were islands at the date of the ratification of said Treaty of 1819 or which formed as islands thereafter, and have since become connected with the south bank as a result of the abandonment by the river of the channels which formerly separated such islands from the south bank.

VI. The state of Texas, as appears from an inspection of the answer filed herein, contrary to the rights of the United States and to the true meaning of the said Treaty of 1819 as declared by this court in *United States v. Texas*, before mentioned, claims for herself sovereignty and political jurisdiction, and for herself and her grantees title to the soil far north of the true boundary and to the line of mid-channel of the Red River. The state of Texas, through her regularly constituted officers, has issued from time to time to divers and numerous persons patents or other instruments purporting to grant lands, islands and parts of the river bed lying north of the line of the south bank, and her grantees have taken possession in accordance with the tenor of the instruments under which they claim and have in many instances extended their claims and possession far north of the true line of mid-channel.

Riparian owners in the state of Texas bordering on the south bank as the same existed at the time of the ratification of the said Treaty of 1819, are claiming by riparian right to the line of mid-channel and in many instances have extended their claims and possession far north of the true line of mid-channel. Furthermore, the state of Texas, through her

regularly constituted officers, has issued gas and oil licenses or permits covering parts of the bed of Red River, and the licensees or permittees have taken possession according to the tenor of the instruments under which they claim. In many instances these claimants under grants, licenses or permits from the state of Texas are maintaining their possession by threats, intimidation and force.

The petitioner is informed and believes, and so alleges, that the state of Texas will continue to issue patents and licenses or permits for other lands and parts of the river bed similarly situated unless restrained by the orders and process of this court.

VII. Notwithstanding the nonnavigable character of the Red River, the state of Oklahoma, through the board of commissioners of her state land office, has set up a claim of title to the entire bed of the Red River, and has advertised for sale numerous oil leases covering portions thereof belonging exclusively to the United States and other portions forming parts of or appertaining to certain Indian allotments. Petitioner is not informed as to whether or not such sales have been consummated, but is informed and believes, and so alleges, that said officers will consummate such sales and make others of similar character unless restrained by the orders and process of this court.

VIII. Numerous individuals, apparently acting on the assumption that the bed of Red River, the islands therein and lands formerly but now connected with the south bank, are public lands of the United States subject to mineral entry, have located and staked out thereon oil placer mining claims, and have posted notices and made filings in the recording offices of various counties of Oklahoma, in formal compliance with the mining laws of the United States. Some of these mining claims include Indian allotments, and others islands, lands and portions of the river bed belonging exclusively to the United States.

IX. Numerous controversies have arisen and now exist between the grantees, licensees and permittees of the state of Texas on the one part and riparian owners and Indian allottees on the north bank and mineral claimants under the laws of the United States on the other part. In many of these controversies litigation has been commenced and is now pending in the courts of both states concerning the disputed lands in which the courts of Texas support by their process, orders, decrees and judgments the contentions of parties claiming from or under that state, and the courts of Oklahoma support the contentions of parties claiming as owners of lands riparian to the north bank or as lessees of Indian allotments or as mineral locators; and in one instance, at least, the rival courts have each appointed a receiver for the same lands and property, and armed conflicts have been narrowly averted between the officers of these courts while attempting to enforce the respective orders and decrees thereof.

X. The Red River is subject to occasional brief but violent and destructive floods which sweep away existing islands or parts thereof and portions of the flood plain, often resulting in the sudden formation of new islands, the filling and abandonment of old channels and the creation of new ones.

The bed of the river is a broad, flat, sandy plain devoid of deep channels, and entirely covered with water only during times of flood. For long periods each year it is entirely devoid of flowing water, and during other long periods is threaded only by small shallow bands of water which are easily deflected and are constantly shifting their courses. During these periods the dry exposed sands are blown about by the winds, frequently forming sand dunes and filling channels between islands and the shores, thus effecting changes more or less permanent in the course of the river. Due to the changes thus brought about by the floods and winds, the exact location of the line of the south bank at the date of the ratification of the Treaty of 1819 has become uncertain in many places and has resulted in conflicting claims and in tres-

passes upon the lands of the United States and of its Indian wards.

XI. As to the allegations contained in paragraph III of the Answer of Texas herein, entitled "Assertion of Rights, Acquiescence Therein and Prescription," petitioner says that the United States never acquiesced in or consented to the exercise of any jurisdiction or claim of title over or to any lands lying north of the south bank of the Red River as said south bank existed at the time of the ratification of the said Treaty of 1819, either by Spain, Mexico, or the republic or state of Texas; that until very recent years the territory bordering the Red River on both sides was sparsely inhabited, and on the north was occupied only by Indians on their reservations. The islands and the lands comprising the flood plain were composed largely of sand dunes, were subject largely to periodical overflow, and were of practically no value for agricultural purposes; and the lands of the United States north of the river were not subject to acquisition under the general land laws; for all which reasons neither public nor private rights came into actual conflict so as to require any action on the part of the United States; that whatever acts of jurisdiction or ownership, if any, were exercised by Texas upon or over lands or portions of the bed of Red River south of mid-channel were only occasional and unimportant and never, in fact, came to the attention of the government of the United States and gave no occasion for counter-action on its part; and that only upon the discovery of oil on the lands in and adjacent to the bed of Red River in the neighborhood of Burkburnett, Texas, early in the year 1919, and the assertion of jurisdiction and ownership then and since made by Texas was there any occasion for action by the United States for the purpose of asserting its rights and those of its Indian wards; and thereupon the United States promptly began investigations and preparations and has since continuously prosecuted them with a view to protecting those rights in the courts.

XII. As to the allegations contained in paragraph IV of the Answer of the state of Texas herein, entitled "The Greer County Case," petitioner says that while it is true that the question involved in that case was the ownership and jurisdiction over the tract of land lying east of the 100th degree of west longitude and between the south, or Prairie Dog Town Fork of the Red River, and the stream known as the North Fork of Red River, yet, petitioner says, that in deciding that question and in making its final decree in said case, it was the duty of this court, sitting as a court of equity, in order to do complete and final justice and put an end to further controversy in respect to the tract involved, to define and delimit with certainty the boundary between the lands of the United States and the lands of the state of Texas; and, having awarded the land in controversy to the United States it became necessary to so define and delimit both the southern and the western boundaries; and petitioner says that the matter of the location of said southern boundary was impliedly and necessarily included in the scope of the issues, that the location of said southern boundary depended upon the construction or interpretation of the Treaty of 1819, and that said Treaty and all the historical and other data bearing upon its proper interpretation were submitted to the court; and the question as to the true location of that boundary could have been, under the issues as made by the pleadings in said cause, actively litigated; that the court did consider and determine that question and its said decree in that behalf is conclusive and binding upon both the parties thereto.

Petitioner further says that the said decree was entered on March 16, 1896; and that on May 4, 1896, the state of Texas filed its petition for rehearing in said cause, comprising nine printed pages and specifying and assigning seventeen different alleged errors of this court in making said decision and in the decree so entered, and in all this mass of matter there was no specification or assignment of error and no word of complaint, protest or dissatisfaction in relation to the action

of this court in fixing by its decree the boundary line between the lands of the United States and the lands of Texas "along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork, or South Fork of Red River"; that said petition was denied by this court on the 4th day of May, 1896, and the state of Texas never, thereafter, in said case, filed any petition, motion or proceeding questioning the correctness of the said decree. Wherefore, this petitioner says that Texas has acquiesced in and has become bound and concluded by said decree as to the boundary line along the Red River between her lands and the lands and property of the United States, and that as to Texas and Oklahoma, the issues therein decided and decreed are *res judicata*.

XIII. As to that part of the Answer of Texas comprised in paragraph VI, entitled "Defendant's Counterclaim," petitioner says that it is not yet advised as to whether any rights, obligations or interests of the United States or its Indian wards are involved in or affected by the controversy therein stated to exist as between the state of Texas and the state of Oklahoma, and will later ask leave to file an amended petition dealing with that subject if information hereafter received shall render that course necessary or advisable.

XIV. The present uncertainties as to the true location of the south bank at the date of the ratification of the Treaty of 1819, the existing controversy between the states of Oklahoma and Texas, their attempts to exercise jurisdiction over the territory in dispute, and the measures taken by their officials and courts respectively to enforce their alleged rights and those of their grantees, licensees and permittees are detrimental to the public tranquillity in which the United States and all the states of the Union have a deep interest; they impede, hinder and embarrass the United States, its officers and agents in the care, administration and conservation of its own property and in the performance of its duties and obligations to its Indian wards.

Wherefore, this petitioner prays:

That it be permitted, in this cause and court, to take and present evidence, examine witnesses and be heard in argument;

That the boundary line between the states of Oklahoma and Texas, from the 100th degree of west longitude to the southeastern corner of the state of Oklahoma, be adjudged and decreed to be the line of the south bank of the said Red River as the same existed on the date of the ratification of the said Treaty of 1819, that is to say, on the 22nd of February, 1821; and that said boundary line be ascertained and marked by permanent monuments;

That the state of Texas be decreed to have no right, title or interest in any lands or any part of the river bed lying north of said line, and be forever enjoined from granting or issuing any pretended titles, licenses, or permits covering any lands or any part of the river bed north of said line;

That the state of Oklahoma be adjudged and decreed to have no right of soil or title in or to any part of the bed of the Red River or in or to any islands therein or any lands which were formerly islands therein, except such lands as may have been granted to her by the United States, or by persons having a lawful title thereto; and that she be forever enjoined from making any pretended sales, or issuing any permits or licenses for the exploration, exploitation or other use thereof, except such as may appertain to her in her political capacity;

That this petitioner may have such other and further relief as it may be entitled to in equity and good conscience.

A. MITCHELL PALMER,
Attorney General.

March, 1920.

(1) From the record in 252 U. S. 372, 64 L. ed. —.

No. 2119.**Report of Commissioners Marking Boundary Line Between Two States.**

For form of report of commissioners for permanently marking the boundary line between two states and the decree of the Supreme Court thereon, see *Indiana v. Kentucky*, 167 U. S. 270.

For decree in similar suit see *Missouri v. Nebraska*, 197 U. S. 577.

No. 2120.**Motion to Dismiss and Answer.(1)****IN THE SUPREME COURT OF THE UNITED STATES**

No. 24, Original, October Term, 1919.

The State of Ohio, Complainant,

vs.

The State of West Virginia, Defendant.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The motion of the defendant, the state of West Virginia, to dismiss the bill of complaint of the state of Ohio, complainant, and the answer of said defendant to said bill of complaint.

This defendant, the state of West Virginia, moves to dismiss said bill of complaint, and for cause of said motion shows:

1. That said bill alleges no facts sufficient to confer original jurisdiction upon this Honorable Court.
2. That said bill alleges no controversy between two states of the Union within the meaning of the constitution of the United States of America
3. That the act of the legislature of West Virginia entitled, "An act in relation to persons, firms and corporations en-

gaged in furnishing, or required by law to furnish, natural gas for public use within this state, to provide remedies for the enforcement of this act and penalties and punishment for violations thereof, and to extend the jurisdiction of the public service commission and of the courts of this state with respect thereto," in said bill mentioned, was and is a valid and constitutional law of said state, and did and does violate none of the provisions of the constitution of the United States or the amendments thereto, in said bill mentioned.

4. That said bill is without equity.

Wherefore, this defendant prays that said bill may be dismissed.

And this defendant, not waiving its said motion to dismiss, and now and at all times saving and reserving to itself all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or to so much or such parts thereof as this defendant is advised it is material for it to make answer unto, says:

I. This defendant admits that the said state of Ohio and this defendant, the state of West Virginia, are states of the United States of America.

II. This defendant admits that the legislature of West Virginia passed, on February 10, 1919, and that the governor of West Virginia approved, on February 17, 1919, an act entitled, "An act in relation to persons, firms and corporations engaged in furnishing, or required by law to furnish, natural gas for public use within this state, to provide remedies for the enforcement of this act and penalties and punishment for violations thereof, and to extend the jurisdiction of the public service commission and of the courts of this state with respect thereto," which act became effective as a statute of said state, under the constitution thereof, ninety days after its passage, a copy of which statute is hereto attached, made part hereof and marked "Exhibit A," and which statute was and is a valid and constitutional law of the state of West Virginia, and did and does violate none of the provisions of the constitution of

the United States or the amendments thereto, in said bill mentioned.

III. This defendant says that the facts, circumstances and conditions existing before, at the time of, and since, the passage of said statute, and the evils sought to be remedied thereby were and are, among others, as in this answer hereafter alleged; and the intention and purpose of the legislature of West Virginia in the passage of said statute, were and are as in this answer hereafter alleged.

Natural gas (hereinafter called gas) is produced by the drilling of wells into gas containing strata of sands in the earth. The known fields in and from which gas is derived are comparatively few and restricted in area. As the number of gas wells drilled in any field increases and the time during which the extraction of gas therefrom lengthens, the volume of the gas and the natural rock pressure, upon which the output depends, gradually diminish not only in the individual wells, but also in the entire field. The constant tendency, therefore, is in the direction of depletion of the field and exhaustion of the gas supply therefrom. And while for a considerable period the aggregate quantity of gas produced from a specific field may be increased or maintained at substantial uniformity, this can only be accomplished by the drilling of new wells, the added extraction of gas from which still further accelerates the depletion of the field. For this reason it becomes necessary to sustain the output by exploration for new gas territory, and the development thereof when discovered. But even this extension of territory can not be continued indefinitely, and the later discovered territories themselves are subjected to the same process of depletion and to the exhaustion of their gas. And so it occurs ultimately that the supply of gas, once adequate to the needs of the population dependent thereon, becomes insufficient for the service of all, and the uses of the gas, or the extent of its distribution and consumption, must be correspondingly curtailed. The foregoing was the experience of the state of

Pennsylvania, Ohio and Indiana, where the extensive development and utilization of their own gas, and the manifest tendency thereof to exhaustion, preceded the commencement of the transportation of West Virginia gas to other states, hereinafter mentioned. And this experience of Pennsylvania, Ohio and Indiana, now in course of duplication in West Virginia, was well known to the gas companies hereinafter mentioned, before and at the time of the commencement of their business; and it was equally known to the people of those states for whose consumption the gas from West Virginia was and is so transported, since that gas was and is furnished to them in aid of, or substitution for, the failing or exhausted gas of their own states.

Gas is, and for more than twenty-five years last past has been, produced and consumed as fuel for the production of light and heat, both domestic and industrial, in West Virginia. Said state is, and for more than twenty years last past has been, one of the principal gas producing states, and the volume of its production is, and for ten years last past has been, the largest in the United States. At the present time gas is produced in large quantities in and from the counties of Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Gilmer, Hancock, Harrison, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mingo, Monongalia, Nicholas, Ohio, Pocahontas, Pleasants, Putnam, Ritchie, Roane, Taylor, Tyler, Upshur, Wayne, Wetzel, Wirt and Wood, being thirty-two of the fifty-five counties of West Virginia. And there is possibility of the existence of gas in other counties of said state.

The commercial production and utilization of gas in West Virginia were originally, and for a number of years essentially local in character, especially in the northern part of the state, wherein the earliest development occurred. Wells there drilled for petroleum oil in some instances discovered gas in paying quantities, and this was followed by the drilling of wells having as their primary object the production of gas.

The volume of gas thus produced was very large; and the gas possessed a high natural rock pressure, enabling it to be transported through pipe-lines for a considerable distance without artificial compression or other means. In the beginning the chief mode of utilization was the distribution of the gas to consumers within the vicinity of the wells. The owners of the output, ordinarily through the medium of corporations organized under the laws of the state of West Virginia, obtained franchises from nearby cities and towns, and constructed pipe-lines, and engaged in the business of public gas service for domestic and industrial purposes to the inhabitants of the municipalities and those along the pipe-lines. The original local production and utilization of gas were speedily followed by further exploration, development and production in the same and other sections, until it came about that gas was and is produced in the thirty-two counties above named.

The magnitude of the gas supply thus developed and the resultant cheapness of the gas brought to pass important social and industrial consequences in those parts of the state where the gas was produced, or to or through which it was transported by the pipe-lines. Prompt recognition of the superior advantages and economy thereof for lighting and heating soon led to the almost universal adoption of gas as the exclusive fuel for dwelling houses, business buildings, churches, schools, colleges, hospitals, asylums, court houses, electric light and power plants, water works, municipal street lighting, and the other buildings, institutions and public utilities of the municipalities, counties and state throughout the greater part of West Virginia, although later illumination by gas was supplanted by electric lighting in many places. In the then existing dwellings and buildings the means and appliances for the consumption of other fuels were generally discarded, and new houses and buildings were in general constructed and equipped with a view to the exclusive utilization of gas for heating, and, in many instances, for illumination. The quantity of gas was so great that a very large supply was also

available for industrial purposes at low prices. By reason thereof the existing industries adopted gas as their fuel, and a great number of new factories and other industries, to which abundant and cheap fuel was important, were established in the sections where the gas was available, both by citizens of West Virginia and by other persons who were attracted to said sections by the gas supply. The local gas companies in many instances, in order to upbuild the cities, towns and communities served by them, and thereby to stimulate the consumption of their gas, pursued for many years the policy of encouraging the location of new factories and industries in their localities by the offer of gas at low prices during long periods of time. The factories and industries thus established, were located and constructed for, and their processes and products especially adopted to, the use of gas as fuel. They employed many workmen and laborers, both skilled and unskilled, many of whom came from other states and countries, and who were dependent for their employment and the livelihood of themselves and their families on the existence and continued operation of the gas using factories and industries. The population of the state as a whole, thus increased; and the added population at once profited the gas companies by adding to the consumption of their gas, and promoted the general prosperity. From this it followed that the domestic life and the business of a majority of the people of West Virginia were and are modified and their adjustments made with reference to the continued use of gas as fuel, and gas in adequate quantities for domestic and industrial use became, was and is a necessity throughout the greater part of the state.

The gas service to the people and industries of West Virginia was reasonably adequate for both domestic and industrial purposes until the winter of 1915-1916. In that winter, and with increasing frequency and duration, in the winters of 1916-1917 and 1917-1918, shortage of gas occurred in many parts of West Virginia which previously had en-

joyed a reasonably adequate supply, including cities, towns and communities located in sections in which, or adjacent to which, gas in large volume was at the time being produced, or through or near which it was being constantly transported by the companies hereinafter mentioned, for consumption in other states. In the coldest weather of the winters aforesaid, the shortage of gas deprived dwelling houses, hotels, stores and public and private buildings of sufficient heat, and, in some instances, of any heat. In the homes and hotels cooking was prevented; and in many cases illness was caused or accentuated by the cold. Public schools were closed for days at a time. Churches were compelled to forego their customary services. Factories were shut down with great loss to their owners, and their workmen thrown out of employment, with consequent hardship to themselves and their families. While in the winter of 1918-1919 conditions were ameliorated by the comparative mildness of the season, yet the supply of gas for domestic and industrial purposes was inadequate. It became and was apparent from the circumstances hereinafter alleged, that in future winters of ordinary severity the shortage of domestic and industrial gas would recur and increase with like or more serious consequences, whereby the people of West Virginia would be driven to the necessity of installing new heating systems and appliances in their homes and other buildings and institutions aforesaid, and to the necessity of altering their factories and industries, so as to adapt them to the use of coal or other fuel, with all of the attendant and resultant enormities of hardship, inconvenience, expense and economic loss, which in the bill of complaint are predicted as probable consequences to the people of the state of Ohio in case of the enforcement of the statute in said bill complained of. And it became apparent also, and the fact was, that the existing and prospective shortage of the gas supply to the people of West Virginia was and would be due to the failure and refusal of the companies hereinafter mentioned to perform their duties as public service corporations of West Virginia to the people of West Virginia.

The cause of the existing and prospective shortage of the gas supply to the people of West Virginia were as follows: When it had been demonstrated by exploration and development that the gas containing areas of West Virginia were large and their actual and prospective production of gas was great, certain large aggregations of capital entered and engaged, upon a large scale, in the business of producing gas and purchasing the gas of other producers, in the construction, maintenance and operation of pipe-lines, and other instrumentalities of production, transportation and supply, and in the transportation, distribution and marketing of the gas so held or acquired. These aggregations of capital, either in their original corporate form or in the form later assumed by them, became, were and now exist principally as seven companies, the Hope Natural Gas Company, The Pittsburgh & West Virginia Gas Company, Reserve Gas Company, The United Fuel Gas Company, Carnegie Natural Gas Company, The Manufacturers Light & Heat Company of Pennsylvania, and Columbia Gas & Electric Company (hereinafter referred to as the seven companies), which seven companies hold a virtual monopoly of the gas business in West Virginia, controlling the gas territory, the production and supply of gas, the market therefor and the instrumentalities of its transportation. The Hope Natural Gas Company, The Pittsburgh & West Virginia Gas Company, The Reserve Gas Company, The United Fuel Gas Company and Columbia Gas & Electric Company, are corporations organized and existing under and by virtue of the laws of the state of West Virginia; and the Carnegie Natural Gas Company and The Manufacturers Light and Heat Company of Pennsylvania are corporations organized and existing under and by virtue of the laws of the commonwealth of Pennsylvania, duly permitted, in conformity with the laws of West Virginia, to hold property and transact business in West Virginia, and under said last mentioned laws having the same rights and powers, and subject to the same liabilities and duties as corporations chartered

by or incorporated under the laws of West Virginia. And before and at all times the incorporation of said West Virginia corporations, and the admission of said Pennsylvania corporations to hold property and transact business in West Virginia, the right was expressly reserved by statute to the legislature of said state to alter any charter or certificate of incorporation granted by said state to any corporation, and to alter or repeal any law applicable to any corporation, as well as the laws whereby said Pennsylvania corporations were so admitted to West Virginia.

Said seven companies were and are incorporated for the purposes or objects, and in and by their respective charters or certificates of incorporation did and do have the power, to engage in the public supply of gas in West Virginia, both for domestic and industrial use, and the other uses to which gas may be applied, and to that end to construct, maintain and operate pipe-lines for the transportation of gas. By their corporate character, the nature of the business engaged in by them, and the express denomination of the laws of the state of West Virginia, said seven companies at all times since their incorporation or admission to hold property and transact business in said state have been, and still are, public service corporations of said state, and, in order to enjoy, and in, about and for the exercise of, the special rights and privileges conferred by the laws of West Virginia on public service corporations, have held, and still do hold, themselves out to said state and the people thereof as such public service corporations.

Of said seven companies, the Hope Natural Gas Company and Reserve Gas Company were and are owned or controlled by the Standard Oil Company of New Jersey, a corporation, and the Hope Natural Gas Company and Reserve Gas Company were and are substantially managed and operated together. The United Fuel Gas Company and the Columbia Gas & Electric Company are closely identified in ownership, management and control.

Said seven companies (or, in certain instances as hereinafter alleged, their predecessor corporations similarly incorporated in or admitted to West Virginia) engaged in the gas business in West Virginia, acquired by purchase or lease large areas of territory productive or having a potential value for the production of gas, until gradually they obtained and now hold ownership of a large majority of the valuable territory in the known and prospective gas fields of West Virginia; and in this territory they did and do drill and produce gas from a large number of wells. The acreage in West Virginia owned or held under lease by said seven companies, operated and unoperated, and the number of their producing gas wells, as of the year ended December 31, 1918, were as follows:

* * * * *

The accumulation of the immense areas aforesaid was rendered possible, and was brought about in large measure, by the domination of the gas fields effected through the pipe-lines and compressor stations hereinafter mentioned. This was accomplished by two processes, often operating concurrently and indistinguishably, in relation to the owners of the gas containing lands and to other producers of gas in the same field. Said seven companies, by means of their pipe-lines and stations obtained the virtual control of the gas territory and the output of gas of the other producers, not themselves the owners of or capable of owning such pipe-lines and stations, and themselves not possessed of a local market. Because, as the production increased, there was a large surplus of gas, in excess of the then requirements of nearby municipalities and industries; and for the utilization of such surplus, transportation to more distant points of consumption was essential. But as the construction of pipe-lines and stations was costly, and vast quantities of gas were necessary for their operation, the construction and operation of such pipe-lines and stations were practicable only for said seven companies. And it followed that because of such ownership of pipe-lines and stations and the absence of other markets, the other producers

were compelled to, and did, sell their gas to one of the seven companies at prices dictated by it, and under contracts providing for exclusive sale to such company, the alternative being the hazard of the draining away of their gas by competitive drilling on neighboring lands, generally in the hands of one or more of the seven companies. When, however, such sales were made, the relatively high pressure maintained in the pipe-lines of the seven companies, and the subsequent manipulation of the pipe-line pressure, which could be, and often was, raised or lowered at the will of such company, prevented the discharge into the pipe-line of a large proportion of the normal marketing capacity of the seller's well; and as the price paid for the gas was based on the quantity discharged into the pipe-line, the gas was at once controlled by such company, while the well owner received little or nothing for it. And while the seller was thus prevented from realizing a fair return on his gas, the gas from neighboring wells, owned by such company and draining the territory of the seller was being received in great volume into other lines of such company in which a much lower pressure was maintained. This discouraged the producer, and minimized his ability to expand his operations, and frequently drove him out of the business of gas production. And in turn the land owner was deprived of the opportunity, which otherwise would have existed, to lease his gas to an independent producer or to obtain the more favorable terms which competitive leasing would have brought about; and thus the land owner was compelled to lease to one of the seven companies or submit to the drainage of his gas by operations on adjacent lands held by them. Nor was this prevented by the statutory provisions of the state of West Virginia denominating the owners of pipe-lines common carriers; since the gas of other owners has uniformly been excluded from their pipe-lines until after sale to the pipe-line company.

In certain instances, also, said seven companies, by purchase of physical properties or corporate stock, acquired title

to, or control of, the territory, wells and production of pre-existing smaller companies operating in the same field. The Manufacturers Light & Heat Company especially was formed by the consolidation or merger of such smaller companies or their properties, and to a varying extent the same is true of all of said seven companies.

Concurrently with, or as an incident to or a consequence of this concentration of the sources of gas production in the hands of said seven companies, the conditions of local gas distribution in the cities and towns were materially affected. In some of the larger cities and towns, as for example, Charleston, Grafton, Huntington and Parkersburg, by purchase of the properties or of controlling interests in the companies engaged in supplying gas to the inhabitants and industries, the franchises, plants, pipe-lines and gas territory of the local companies were acquired. In Clarksburg two competing companies were consolidated or merged, their municipal franchises, plants and part of their territory conveyed to a new company, the majority of the stock in which was vested in said Standard Oil Company of New Jersey, the owner of said Hope Natural Gas Company; and a large area of highly productive gas territory previously held by one of the pre-existing local companies was transferred to said Hope Natural Gas Company, the ultimate consequence of which was the insufficiency of the territory of the consolidated or merged company for adequate local gas service. In numerous other cases franchises were obtained by said seven companies from cities and towns in West Virginia, or in the case of unincorporated villages and rural communities franchises or privileges in the nature thereof were obtained from the county courts, and the public distribution of gas for domestic and industrial purposes engaged in. Among the cities, towns and villages thus supplied by said seven companies were and are the following:

* * * * *

In respect to the other gas companies, engaged in local distribution to the public, the gas in their own respective terri-

tories gradually decreased in volume; and the decline of the natural pressure of their remaining gas eventually rendered it impracticable to transport it without the artificial aid of compressor stations, the great cost of which was practically prohibitive to such local companies. But on the other hand, when the shortage of gas became imminent, the withdrawal of available territory through the extensive ownership of said seven companies within a practicable distance from the localities served by the local companies, prevented the acquisition to any considerable or sufficient extent by said local companies of further territory for present production of future reserves; so that it became increasingly difficult, and in many instances impossible, for said local companies to supply their deficiencies by operations of their own, or to deliver to their consumers gas in the quantities required by the public need.

From all this the following consequences resulted:

1. Said seven companies attained and now possess a virtual monopoly of the gas supply of West Virginia and the sources of production thereof.
2. Many of the cities, towns, villages and rural communities, their inhabitants and industries became, were and are wholly dependent on said seven companies for their gas supply.
3. Local companies engaged in the distribution of gas to the public, as their sources of supply became inadequate and tended to exhaustion, became, were and are unable to add to or replace their insufficient supply, so that they in turn have become and are dependent on said seven companies for the gas necessary to render an adequate service to their consumers.

The extent of the engrossment of the available gas in West Virginia by said seven companies is illustrated by the following statistics, based on reports to the Board of Public Works of West Virginia, as of the year ended December 31, 1918, which are fairly indicative of conditions in preceding years.

The total production of gas in West Virginia in the year ended December 31, 1918, is authoritatively estimated to have been 280,000,000 M. cubic feet, of which approximately

30,000,000 M. cubic feet were produced and consumed by dependent or private consumers engaged in industrial enterprises, owning and consuming gas produced by them and in no way obligated to the service of the public. The remaining 250,000,000 M. cubic feet was the gross amount of West Virginia gas produced or acquired by purchase by the public service gas companies of West Virginia; but therefrom must be deducted about 19,000,000 M. cubic feet used and consumed in and about the drilling of wells and other field operations, so that the total net supply of gas in the hands of said public service gas companies available for public use was about 231,000,000 M. cubic feet. Of the above gross amount produced and acquired and the net amount available for public use, the proportions held by said seven companies, are shown by the following figures taken from the returns made by said seven companies to said Board of Public Works for the year 1918:

* * * * *

It follows that said seven companies reduced to their possession about 87 per cent. of the entire supply of West Virginia gas available for public use.

V. As a prerequisite to the acquisition of gas in the volumes aforesaid, its storage and subsequent transportation to the points of consumption or sale, either within or without West Virginia, beyond the immediate vicinity of the sources of production, it became, was and is necessary for said seven companies to construct and operate a great system of pipe-lines in West Virginia. The number and total length of these lines are enormous, and together they constitute a vast connected system, at once a reservoir and a means for the transportation and distribution of the gas; and they are so connected and operated that the gas may be directed or diverted from one point or line to another at the will of the owner of the pipe-line. The several pipe-line systems of said respective companies are also physically connected in a number of instances in West Virginia. The Hope Natural Gas Company and The Reserve

Gas Company, the Hope Natural Gas Company and The United Fuel Gas Company, the Hope Natural Gas Company and The Manufacturers Light & Heat Company, The United Fuel Gas Company and the Columbia Gas & Electric Company, and The United Fuel Gas Company and The Pittsburgh & West Virginia Gas Company are so connected, and by means thereof sales exchanges and deliveries of gas are made in West Virginia between said connected companies.

The individual pipe-line systems begin with the well lines, consisting of pipes of small diameter, directly connected with the wells, which in turn connect with larger lines or pipes. The gas is finally conducted to and discharged into still larger lines or pipes, commonly called trunk lines or mains, through which the gas is carried under high pressure (originally afforded by the natural pressure of the gas, but now artificially furnished or added to by compressor or pump stations situate at proper intervals) to the points of distribution for consumption and the points of delivery to the owners of connecting lines. The trunk lines are thus fed by a large number of subsidiary lines, which connect with them at many points throughout their length in the gas producing territory. The gas proceeding from the subsidiary lines into a trunk line, there becomes commingled into a common and homogeneous stock, drawn upon for distribution or delivery at the points of consumption or sale as the owner of the trunk line may desire. In order to accomplish the distribution or delivery of the gas at the points of consumption and sale, other pipes are connected with and branch off of the trunk line at convenient places throughout its length. By means of the branch lines, gas for local consumption is withdrawn from the trunk line and delivered to the local distributing plants or consumers.

Although by the control of the flow of the gas which is maintained by the owner of the trunk line, it may be arranged that a definite proportion or quantity of the whole stock of gas in the pipe line system will reach the point or points of delivery, yet the nature of the gas is such that no mark of identi-

fication can ever be placed upon, nor is it possible to identify, any atom or specific quantity thereof; so that until, in the progress of the gas through the trunk line the last connection of a pipe devoted to local service in West Virginia has been passed, it is not and can not be ascertained whether any particular part of the gas, in the aspect of a physical entity, will be consumed in West Virginia, or will pass to and be consumed in another state. Gas, whether consumed in West Virginia or in other states, is commingled and carried in the same trunk lines of said pipe-line systems.

Based upon the best information obtainable by this defendant, the number, size and mileage in West Virginia of the trunk lines of said seven companies are as follows:

* * * * *

One or more of said trunk lines traverse forty-two of the fifty-five counties of West Virginia, as follows:

* * * * *

And along or in such short distance from said trunk lines that the supply of gas therefrom would be easily practicable, are located a great number of cities, towns and villages in West Virginia, now lacking an adequate supply of gas.

The construction and operation of said pipe-line systems were and are essential to the accumulation of said large stocks of gas of said seven companies and the transportation thereof to the points of consumption or sale; and in order to construct, maintain and operate such pipe-line systems, it was necessary for said seven companies to exist as, and perform the duties of, public service corporations, so as to enable them to possess and exercise special rights and privileges, which were and are granted to such corporations by and under the laws of West Virginia. Such special rights and privileges did and do consist of the power of eminent domain, franchises and permits from county courts, cities and towns to construct, maintain and operate their pipe-lines and telegraph and telephone lines in, along and across the public highways and streets, and, in

the instances where said seven companies were or are engaged in the local distribution of gas, franchises for such distribution.

The power of eminent domain, enjoyed by said seven companies was and is especially essential to their existence and business. For their pipe-lines could not be constructed, maintained or operated without the taking and damaging of private property for the rights of way for their many miles of pipe-lines and telegraph or telephone lines. But under the laws of West Virginia there could be and is no power of eminent domain except in aid of a business, service or works affected with a public use or interest for the benefit of the people of West Virginia; and the right of eminent domain was and is delimited by, and coincides with, the public use or interest which it was and is intended to promote. And in particular, under the laws of West Virginia, it was and is the duty of companies such as said seven companies to serve the public with gas, under reasonable and proper regulations, along the entire line traversed by their pipe-lines at reasonable rates, and without unjust discrimination. In recognition of the importance of the public use or interest with which such pipe-lines were and are affected, such companies, in addition to the ordinary procedure for the condemnation of property which they theretofore were, and still are, entitled to invoke, also have been for twelve years last past, and are entitled by the laws of West Virginia to condemn rights of way for their pipe-lines by an especially summary and speedy procedure, applicable to no other work of public utility except pipe-lines for the transportation of oil. This power of eminent domain was exercised by said seven companies in and for the acquisition of their rights of way for their said pipe-lines, both by judicial proceedings and in many cases and by the influence of the known existence of said power in negotiations with property owners from whom purchases were affected.

In and about the construction, maintenance and operation of said pipe-lines it was and is necessary, also, in very many places to locate the same along, across or under public high-

ways and streets. But by the laws of West Virginia the power of the county courts and municipal corporations to grant franchises or permits for the construction, maintenance and operation of pipe-lines along, across or under highways and streets was and is confined to pipe-lines in and for a business, service or works affected with a public use or interest, in like manner as the power of eminent domain. In every eminent domain proceeding and in every application to the county courts and municipal corporations for the franchises or permits aforesaid, said seven companies, therefore, did and do aver, in substance and affect, their public character and their readiness and willingness at all times to furnish, at reasonable rates, gas to all persons within the range of their pipe-lines.

In and about the exercise of the rights and privileges aforesaid, and in the general conduct of their business, said seven companies did and do recognize, and act in accordance with their status or character as public service corporations of West Virginia, except insofar as they have failed and refused, and still fail and refuse, to furnish for the use of the public of said state within the range of their pipe-lines a reasonably adequate supply of gas as herein alleged. And since the enactment of the Public Service Commission Law of West Virginia in the year 1913, said seven companies and all other gas companies serving the public, have been, and they still are, public service corporations within the purview of said law, and have been and are subject to the jurisdiction of said Public Service Commission. A copy of the Public Service Commission Law of West Virginia as now in force and effect, is hereto attached, made part hereof and marked "Exhibit B."

In addition to their business of supplying gas to the public of West Virginia, said seven companies, after the construction of their respective pipe-line systems aforesaid, also engaged, and are still engaged, in the business of the transporting gas to, or for consumption in, other states, principally Pennsylvania, Ohio and Kentucky. A part of said gas, constituting a relatively small proportion of the West Virginia gas con-

sumed in said other states, was and is transported into, and distributed to the consumers therein, by certain of said seven companies. But the greater part of the West Virginia gas consumed in said other states, and substantially all of the gas of several of said seven companies, so consumed, was and is sold for delivery, and was and is in fact delivered, to other gas companies at or very near to the respective boundary lines between West Virginia and said other states, and a large part of said gas was and is delivered to said other companies in West Virginia. Said other companies to whom such sales and deliveries were and are made, themselves distribute said gas, or deliver the same to still other companies for distribution, to the consumers in said other states. This defendant is informed and believes, and on information and belief says, that under the provisions of the contracts made, the obligation of said selling companies to make such deliveries was and is restricted to the extent of the gas supply of said companies and conditioned upon its ability to deliver the gas to the other company, with which such a contract was made.

At the inception of said business of transporting gas to or for use in other states as aforesaid, the production of the gas fields of West Virginia was increasing, the demands of the communities served by said seven companies were relatively small, and many of the cities, towns and rural communities were supplied by local gas companies, then possessing adequate gas for their then needs, as aforesaid. A very large surplus, therefore, existed for transportation to and consumption in other states, without injury to, or infringement of the rights of, the people of West Virginia. Said conditions continued for many years, until the development of new territory and the production in the known fields no longer kept pace with the ever increasing demand for gas, and until the natural tendency of the known fields, and of the wells therein, to decline in production and the ultimate exhaustion manifested themselves. The proportion of the gas controlled by said seven companies which was transported to or for use in the

other states largely exceeded, and does exceed, that supplied by them to the people of West Virginia, and the said proportion in favor of said other states constantly increased, due largely to the growth of consumption in said states, the extension of gas service of new localities and the decline of the production of Pennsylvania and Ohio.

The progressive increase of the consumption of West Virginia gas in other states was as follows:

* * * * *

Illustrative of said disproportion of the gas supply by said seven companies to the people of West Virginia are the following statistics, as of the year ended December 31, 1918, when, even after the aforesaid shortage in West Virginia, out of the total public supply of 231,000,000 M. cubic feet received 29,835,894 M. cubic feet as follows:

* * * * *

During the same year, typical of conditions in previous years, said seven companies transported to, or for consumption in, other states, 171,928,604 M. cubic feet of West Virginia gas, distributed as follows:

* * * * *

It thus was brought to pass that while the people of West Virginia were deprived of a reasonably adequate supply of gas, out of the total production of West Virginia, available for public use, aggregating 231,000,000 M. cubic feet, 76 per cent. thereof was transported to or for consumption in other states. And out of the 201,764,491 M. cubic feet of said seven companies 85 per cent. was transported to or for consumption in other states.

The West Virginia gas thus transported did and does constitute over thirty-five per cent. of all the gas consumed in Pennsylvania, and over fifty per cent. of all the gas consumed in Ohio; while at the same time there was and is produced in Pennsylvania approximately fifty-seven per cent. of all the gas consumed therein, and there was and is produced in Ohio approximately forty-one per cent. of the gas therein consumed.

Approximately seventy-two per cent. of all the gas consumed in Pennsylvania was and is consumed for industrial purposes, and approximately fifty per cent. of all the gas consumed in Ohio was and is consumed for industrial purposes.

VI. The shortage of gas supply to the people of West Virginia was and is caused by the transportation to or for consumption in other states of enormous quantities of gas by said seven companies as aforesaid. And the said companies did and do refuse to supply the gas required for reasonably adequate service to the public of West Virginia within the range of their pipe-lines, or to the local gas companies engaged in the service of said public, under the pretext that they were and are prevented from so doing by the necessities of the gas consuming populations of said other states.

Under these circumstances an issue arose between the state of West Virginia and the people thereof on the one side and the said seven gas companies on the other. On the one hand it was insisted by said state and its people that they were entitled to a reasonably adequate gas supply to the extent, for the purposes and by the means later specified in and by the statute complained of in said bill of complaint, and that the duty of furnishing said supply rested on said seven companies as well as the other public service gas companies of West Virginia. On the other hand it was insisted by said seven companies, as they still do insist, that they were and are unable to render additional service or furnish additional gas in West Virginia, either directly to the public or to the local gas companies therein, because of the alleged necessities of the people of said other states and the contracts aforesaid. And said seven gas companies further contended as they still do contend, that their gas is private property, which they were and are entitled to dispose of when, where and as they choose, and that they owed no higher duty to the state of West Virginia or the people thereof than to the other states and their gas consuming population.

Confronted with the foregoing among other facts, circumstances and conditions, and in the light thereof, the legislature of West Virginia, at its session of 1919, in the exercise of its police and other powers, enacted the statute complained of in the bill of complaint. This statute had and has as its sole and only object, and the sole intention of the legislature in enacting the same, was to secure to the inhabitants and industries of West Virginia in said statute mentioned, a reasonable adequate supply of gas out of the abundance produced in said state. And in the intention and purpose of said legislature, as by said statute appears, said statute was and is applicable not only to said seven companies, but also to the other public service gas companies of West Virginia, upon all which like rights and duties are imposed, with a view of securing such reasonably adequate gas supply.

VII. This defendant further says that all of the losses, injuries and inconveniences, if any, which may happen to said state of Ohio, the people thereof, or said seven or other gas companies, in said bill mentioned, are and will be indirect and consequential upon the just and lawful exercise of the rights and powers of the state of West Virginia, and are and will be *damnum absque injuria*.

VIII. This defendant admits that said bill of complaint was presented and filed by virtue of the direction and authority contained in the joint resolution of the General Assembly of the state of Ohio and the written direction of the governor of said state, in said bill mentioned. But this defendant denies all of the recitals, assertions, inferences and conclusions of fact in said resolution contained, insofar as the same are not admitted by, or are inconsistent with, the allegations of this answer; and denies all of the conclusions of law in said resolution contained.

IX. This defendant admits the allegations of Paragraph First of said bill, except the allegations of desire to invest and investment in, and development of gas territory in West Virginia by citizens and corporations of Ohio. This defendant

admits that in some instances citizens and corporations of Ohio, in like manner as many citizens and corporations of West Virginia and other states, invested and engaged in the development of gas territory, and the production of gas, in West Virginia. A very large proportion of said investments were and are investments in said seven companies and other public service gas corporations in West Virginia. But this defendant is without knowledge whether the gas fields of West Virginia have been developed from their inception, or are being developed to a great extent, by citizens or corporations of Ohio.

This defendant admits that by the furnishing of a reasonably adequate supply of gas for the use of the public in West Virginia, as required by said statute in said bill complained of, the volume of West Virginia gas available for transportation to or for consumption in Ohio and other states, and the quantity of gas so transported, will be indirectly or incidentally diminished unless said seven companies or other gas companies shall increase gas production in West Virginia by the development of the large bodies of gas territory at present not operated, and principally in the possession of said seven companies. In case of the failure to increase the production of West Virginia gas as aforesaid, whether or not the quantity thereof transported to, or for use in, Ohio or any other state will be appreciably decreased will depend in a large degree upon the apportionment of the gas transported from West Virginia by said seven companies among the several states, other than West Virginia, desiring to consume the same. This defendant denies that the purpose of said statute is, or the effect thereof will be, as in Paragraph Second of said bill alleged; denies that the furnishing of a reasonably adequate supply of gas to the public of West Virginia as provided by said statute, or the enforcement of said statute, will require all, or substantially all, of the gas produced in said state, or will result in the denial of gas to even the preferred or domestic consumers in Ohio, as in said bill alleged; denies that by the enforcement of said statute the transportation of gas from West Virginia into Ohio

will not be allowed for the first preferred class of consumers in said state, to-wit, domestic consumers, as in said bill alleged; and denies that the transportation of gas from West Virginia into Ohio will be prohibited. This defendant denies that the furnishing of a reasonably adequate supply of gas to the public of West Virginia, as provided by said statute, or the enforcement thereof, will require or consume any large proportion of the aggregate quantity of gas now transported to, or for consumption in, other states. Except as in this answer otherwise alleged, this defendant admits the allegations of said Paragraph Second of said bill.

This defendant denies that to the extent or in the sense in Paragraph Third of said bill alleged, the gas distributing plants in Ohio, mentioned in said paragraph, were constructed because of the discovery of gas in West Virginia or the transportation thereof from West Virginia into Ohio. On the contrary, this defendant is informed and believes, and on information and belief says, that many of said plants were originally constructed for the utilization of artificial gas or of gas produced in Ohio and other states than West Virginia, either without, or in combination with, West Virginia gas; and that said plants are susceptible of conversion or reconversion into plants for the distribution of artificial gas, as all of them must ultimately be, upon the inevitable termination of the natural gas supply. This defendant denies that to the extent or in the sense in said paragraph alleged the inhabitants of, or the municipalities in, Ohio are dependent upon the use of gas. On the contrary, this defendant says that many of said inhabitants employ coal, artificial gas and electricity, or one or more of them, and still others of said inhabitants have their homes, places of business and factories equipped for the utilization of such fuels, so that the use thereof can be readily adopted or resumed. Except as in this answer otherwise alleged, this defendant admits the allegations of said Paragraph Third of said bill.

This defendant denies that to the extent or in the sense in Paragraph Fourth of said bill alleged, the corporations or companies therein mentioned have built or constructed from said municipalities of Ohio to the gas producing fields of West Virginia large trunk lines for the transportation of gas to said municipalities for distribution, sale or use therein. This defendant is informed and believes, and on information and belief says, that none of said companies except The United Fuel Gas Company has built or constructed, or owns or operates, any trunk or other line into West Virginia for transporting gas therefrom; although it is true, as this defendant is informed and believes, that said companies, other than The United Fuel Gas Company, receive deliveries of West Virginia gas in trunk lines owned or controlled by them. This defendant says that the circumstances under which, the extent of which, and the manner in which, the said seven companies, in the preceding paragraphs of this answer mentioned, transport gas to, or for consumption in, Ohio was and is as in this answer alleged, and not otherwise; and that except as aforesaid this defendant is without knowledge as to the conduct of the business of the municipalities and gas companies engaged in the local distribution of gas in Ohio, or the contracts under which gas is distributed to inhabitants, consumers and municipalities thereof. This defendant denies that said inhabitants and consumers in Ohio now rely almost wholly upon the use of gas for light, heat, fuel and other purposes; but, on the contrary, says that the nature and extent of the dependence of said inhabitants and consumers upon gas is as in this answer heretofore alleged. All contracts in West Virginia, as in Ohio, with consumers of industrial gas provide for preference to domestic consumers, and for cutting off all other classes of users in case of shortage of supply of gas. Except as in this answer otherwise alleged, this defendant admits, the allegations of said Paragraph Fourth of said bill.

X. While this defendant admits that gas is or may be an article of interstate commerce, yet this defendant denies that

gas placed in mains or pipes by public service gas companies, is either in interstate commerce or a legitimate article of interstate commerce, unless and until it has reached the point where it is no longer subject to the public service in West Virginia, and the duties imposed by law upon public service gas companies have been observed and performed by them; and denies that the requirement of the performance or observance of the duties owed by such companies is an interference with interstate commerce or a burden thereon.

This defendant is without knowledge as to the proportion of the pipe-lines in Paragraph Sixth of said bill mentioned, which are laid for the exclusive purpose of, or are now engaged in, transporting and handling gas produced in West Virginia. Except as in this answer otherwise alleged, this defendant admits the allegations of said Paragraphs Fifth and Sixth.

XI. This defendant denies the allegations of Paragraph Seventh and the other paragraphs of said bill which are precluded upon the total or substantially total discontinuance of the supply of West Virginia gas to Ohio. This defendant admits that in case of the diminution of the West Virginia gas transported to Ohio, and which diminution will eventually occur from natural causes, irrespective of said statute or enforcement thereof, said state of Ohio and the other consumers of gas therein will be compelled to modify proportionately and in the end abandon the consumption of gas, unless other sources of supply shall be discovered and utilized.

This defendant admits, as is by said Paragraph Seventh implied, that an inadequate gas service, or the insufficiency in pressure and quantity of gas supplied, is practically equivalent to an entire absence of gas, which fact is equally applicable to and in West Virginia as Ohio. And this defendant says that, if and when the gas available for consumption in Ohio shall be so diminished in pressure and quantity that an adequate service can not be received by all consumers, the remedy therefor must be the contraction by internal regulation of the state of Ohio, of the territorial scope of service or distribution and

of the number of its consumers. Such remedy must ultimately be applied in West Virginia, as well as in Ohio, in the natural course of events, irrespective of the enforcement of said statute. This defendant admits that the abandonment of gas consumption, through inadequacy of supply, will occasion inconvenience and loss to the consumers affected, whether in Ohio or West Virginia, and that the appliances theretofore used for gas will in some instances have a mere salvage value, although in others they may be adapted to the consumption of other fuel. And this defendant further says that all of the conditions, inconveniences, losses and other consequences which will result to the state of Ohio and its people, in case of the deprivation of an adequate supply of gas, will, in intensified measure and degree, result to the state of West Virginia and its people, in case of their deprivation of a reasonably adequate supply of West Virginia gas. This defendant says that it is probable that a very large quantity of West Virginia gas will still be available for transportation to, and consumption in, Ohio and other states for a considerable time, notwithstanding the enforcement of said statute; Ohio still produces a large volume of gas, a considerable proportion whereof is used for industrial purposes in Ohio; and the distribution of gas, as between domestic and industrial consumers in Ohio is a subject for internal regulation by Ohio, and, unless or until so regulated by said state, will depend on the policy or will of the gas companies engaged in local distribution. And this defendant says that the existence or extent of the curtailment of gas supply, the inconvenience, loss, expenditures or expenses of or to said state or the domestic consumers in, or the counties, municipalities or political sub-divisions of Ohio, in consequence of the enforcement of said statute, will depend upon like considerations and contingencies. This defendant is without knowledge as to the contracts in said Paragraph Seventh of said bill mentioned. Except as in this answer otherwise alleged, this defendant admits the allegations of said Paragraph Seventh.

XII. This defendant says that the tenor and effect of said statute, and the intention and purpose of the legislature of West Virginia in enacting the same, were, are and will be as in said statute made manifest and as in this answer alleged, and not otherwise. And this defendant denies each and every of the allegations of Paragraphs Eighth and Ninth, as well as all the other allegations of said bill, in respect to the tenor or effect of, or the intention or purpose of said legislature, in enacting said statute, insofar as said allegations are inconsistent with the true intent and meaning of said statute and the allegations of this answer in regard thereto.

XIII. This defendant denies that said statute was passed for the purpose of preventing the transportation of gas beyond the borders of West Virginia, or for any other purpose or with any other intent than as in this answer alleged; denies that said statute is wholly or in part illegal or void; denies that said statute conflicts with, offends against or is in contravention of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, granting to Congress the power to regulate commerce among the several states; denies that said statute is or will be a regulation of commerce among the states; denies that said statute conflicts with, offends against or is in contravention of the Fourteenth Amendment to said Constitution; denies that said statute abridges the privileges or immunities of any of the residents or citizens of Ohio, as citizens of the United States; denies that said statute deprives said persons, or any of them, of their property without due process of law, or denies to them the equal protection of the law; denies that said statute conflicts with, offends against or is in contravention of Section 10 of Article 1 of said Constitution; denies that said statute impairs the obligation of contracts of said state of Ohio or any of the citizens or residents thereof; denies that the effect of said statute is or will be to require the persons or companies engaged in producing gas within West Virginia and transporting it outside of said state for sale or distribution, or those companies engaged only in transporting gas from

West Virginia, to devote their entire supply of gas to the needs or wants of consumers inside West Virginia, or to transport no gas whatever outside of West Virginia; denies that said seven companies, or any other person or company engaged in the production of gas in West Virginia, so far as this defendant is informed and believes, is engaged only in transporting gas from West Virginia; and denies that it is the purpose or the necessary or direct effect of said statute to prevent the exportation of gas outside of West Virginia, or to cut off from users of gas in Ohio or other states that part of their supply of gas which they now obtain from West Virginia.

This defendant admits that it is the purpose of this defendant to impose fines and penalties upon any person or company that shall refuse to obey such orders of the Public Service Commission of West Virginia as are authorized by said statute, which orders can only be made after the due notice and hearing and due process of law, as provided by said statute and the Public Service Commission Law of said state; and this defendant further says that by the tenor and effect of said statute no fine or penalty can be imposed except after such order by said commission, followed by judicial procedure. Except insofar as hereinbefore admitted, this defendant denies the allegations of Paragraph Tenth of said bill.

XIV. This defendant denies that said statute will, except in directly or incidentally to the extent and in the contingencies hereinbefore alleged, prevent the transportation of gas in interstate commerce or the carriage of gas through pipe-lines in West Virginia into, or for sale to, the state of Ohio and other states, as in said bill charged; denies that said statute is null or void, or without force or effect, on all or any of the grounds, or for all or any of the reasons, in said bill charged; and denies that any attempt by this defendant to carry out said statute would be a gross, or any, wrong against the rights or property of said state of Ohio, or the rights, property, health, convenience or safety of any of the citizens or residents of Ohio,

or would work a great or irreparable loss or injury to said state or its citizens or residents, as charged in said bill.

XV. This defendant denies that said state of Ohio is entitled to all or any part of the relief prayed in and by said bill. And this defendant prays that the preliminary injunction heretofore issued in this cause may be dissolved.

And this defendant having fully answered said bill, prays to be hence dismissed with its reasonable costs. And as in duty bound, it will ever pray, etc.

THE STATE OF WEST VIRGINIA,
By EDWARD T. ENGLAND,
Its Attorney General.

[Verification.]

(1) From the record in 252 U. S. 563, 64 L. ed. —.

PROCEEDINGS IN THE PATENT OFFICE

PETITIONS.

No. 2121.

Petition by a Sole Inventor.(1)

To the Commissioner of Patents:

Your petitioner —, a citizen of the United States and a resident of —, in the county of —, and state of — [or subject, etc.], whose postoffice address is —, prays that letters patent may be granted to him for the improvement in —, set forth in the annexed specification.

Signed at —, in the county of — and state of —,
this — day of —, 19—. —.

(1) R. S., Sec. 4888; P. O. Rule 33.

No. 2122.

Petition by Joint Inventors.(1)

To the Commissioner of Patents:

Your petitioners, — and —, citizens of the United States and residents, respectively, of —, in the county of — and state of —, and of —, in the county of — and state of — [or subject, etc.], whose postoffice addresses are, respectively, — and —, pray that letters patent may be granted to them, as joint inventors, for the improvement in —, set forth in the annexed specification.

Signed at —, in the county of — and state of —,
this — day of —, 19—. —.

(1) R. S., Sec. 4888; P. O. Rule 33.

No. 2123.**Petition by an Inventor, for Himself and Assignee.(1)**

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of — and state of — [or subject, etc.], whose postoffice address is —, prays that letters patent may be granted to himself and —, a citizen of the United States and a resident of —, in the county of — and state of —, whose postoffice address is —, as his assignee, for the improvement in —, set forth in the annexed specification.

Signed at —, in the county of — and state of —, this — day of —, 19—. —.

(1) R. S., Sec. 4888; P. O. Rule 33.

No. 2124.**Petition with Power of Attorney.(1)**

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of — and state of — [or subject, etc.], whose postoffice address is —, prays that letters patent may be granted to him for the improvement in —, set forth in the annexed specification; and he hereby appoints —, of —, state of —, his attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the patent office connected therewith.

Signed at —, in the county of — and state of —, this — day of —, 19—. —.

(1) R. S., Sec. 4888; P. O. Rule 33.

No. 2125.

Associate Power of Attorney (Filed with Application).

In the matter of this application for letters patent, we hereby appoint — of Washington, D. C., as our associate attorney, with full power and authority to do and perform in our name, all acts and things required of or accorded to us by the foregoing power of attorney, (1) hereby ratifying whatever he, as our said associate, may lawfully do in the premises.

(1) Contained in the petition.

No. 2126.

Revocation of Power of Attorney.

Honorable Commissioner of Patents,
Washington, D. C.

Sir: I hereby revoke the power of attorney heretofore filed by me to Messrs. A. & B. in the matter of my application for letters patent of the United States for an improvement in columns, filed October 17, 1905, Serial No. 283,099. This revocation of the power of attorney implies no lack of confidence in Messrs. A. & B.

Very Respectfully.

X. R.

No. 2127.

Notice by Commissioner of Patents of Revocation of Power of Attorney.

DEPARTMENT OF THE INTERIOR

Serial No. 283,099, Paper No. 3

Washington, D. C., January 12, 1906

Sir: You are hereby informed that your power of attorney has been revoked in the matter of the application of George F. Thorn for letters patent for an improvement in column.

No. 283,099.

Filed —.

Very respectfully,

F. I. ALLEN,
Commissioner.

To A. & B.

No. 2128.**Notice by Commissioner of Patents of Acceptance of Power
of Attorney in Pending Case.**

DEPARTMENT OF THE INTERIOR

United States Patent Office

Washington, D. C., January 12, 1906.

Sir:

You are hereby informed that your power of attorney has been accepted in the matter of the application of S. R. T. for letters patent for an improvement in column.

No. 283,099.

Very respectfully,

Filed, ———.

F. I. ALLEN,
Commissioner of Patents.

To W. B.

No. 2129.**Petition by an Administrator.(1)**

To the Commissioner of Patents:

Your petitioner, ———, a citizen of the United States and a resident of ———, in the county of ——— and state of ——— [*or* subject, etc.], whose postoffice address is ———, administrator of the estate of ———, late a citizen of ———, deceased (as by reference to the duly certified copy of letters of administration, hereto annexed, will more fully appear), prays that letters patent may be granted to him for the invention of the said ——— (improvement in ———), set forth in the annexed specification.

Signed at ———, in the county of ——— and state of ———,
this ——— day of ———, 19——.

Administrator, etc.

(1) R. S., Sec. 4888: P. O. Rule 33.

No. 2130.

Petition by an Executor.(1)

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of —, and state of — [or subject, etc.], whose postoffice address is —, executor of the last will and testament of —, late a citizen of —, deceased (as by reference to the duly certified copy of letters testamentary, hereto annexed, will more fully appear), prays that letters patent may be granted to him for the invention of the said — (improvement in —), set forth in the annexed specification.

Signed at —, in the county of — and state of —, this — day of —, 19—.

—,
Executor, etc.

(1) R. S., Sec. 4888; P. O. Rule 33.

No. 2131.

Petition by a Guardian of an Insane Person.(1)

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of —, and state of — [or subject, etc.], whose postoffice address is —, and who has been appointed guardian [or conservator or representative] of — (as by reference to the duly certified copy of the order of court, hereto annexed, will more fully appear), prays that letters patent may be granted to him for the invention of the said — (improvement in —), set forth in the annexed specification.

Signed at —, in the county of — and state of —, this — day of —, 19—.

—,
Guardian, etc.

(1) R. S. Sec. 4888; P. O. Rule 33.

No. 2132.**Petition for a Reissue (by the Inventor).(1)**

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of —, and state of — [or subject, etc.], whose postoffice address is —, prays that he may be allowed to surrender the letters patent for an improvement), and that letters patent may be reissued to him [or the sole owner (or whereof —, on whose behalf and with whose assent this application is made, is now sole owner, by assignment), and that letters patent may be reissued to him [or the said —] for the same invention upon the annexed amended specification. With this petition is filed an abstract of title, duly certified, as required in such cases.

Signed at —, in the county of — and state of —, this — day of —, 19—. —.

[Assent of assignee to reissue.]

The undersigned, assignee of the entire [or of an undivided] interest in the above mentioned letters patent, hereby assents to the accompanying application. —.

(1) R. S. Secs. 4895, 4916; P. O. Rules 85'to 92

No. 2133.**Petition for a Reissue (by the Assignee).(1)**

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of —, and state of — [or subject, etc.], whose postoffice address is —, prays that

he may be allowed to surrender the letters patent for an improvement in —, No. —, granted —, 18—, to —, now deceased, whereof he is now owner, by assignment of the entire interest, and that the letters patent may be reissued to him for the same invention, upon the annexed amended specification. With this petition is filed an abstract of title [*or* an order for making and filing the same, etc.].

Signed at —, in the county of — and state of —, this — day of —, 19—.

(1) This form is to be used only when the inventor is dead. See also note to No. 2132.

No. 2134.

Petition for Letters Patent for a Design.(1)

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a subject, etc.], whose postoffice address is —, prays that letters patent may be granted to him for the term of three and one-half years [*or* seven years or fourteen years] for the new and original design for —, set forth in the annexed specification.

Signed at —, in the county of — and state of —, this — day of —, 19—.

(1) R. S., Secs. 4929 to 4933; P. O. Rules 79 to 84.

No. 2135.

Petition for a Caveat.(1)

Law repealed by Act of July 1, 1910.

No. 2136.**Petition for the Renewal of a Forfeited Application.**

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States and a resident of —, in the county of —, and state of — [*or* subject, etc.], whose postoffice address is —, represents that on —, 18—, he filed an application for letters patent for an improvement in —, serial number —, which application was allowed —, 18—, but that he failed to make payment of the final fee within the time allowed by law. He now makes renewed application for letters patent for said invention, and prays that the original specification, oath, drawings, and model may be used as a part of this application.

Signed at —, in the county of — and state of —, this — day of —, 19—. —.

SPECIFICATIONS.

No. 2137.

For an Art or Process (1).

To all whom it may concern :

Be it known that I, —, a citizen of the United States, residing at —, in the county of —, and state of — [or subject, etc.], have invented new and useful improvements in processes of extracting gold from its ores, of which the following is a specification :

This invention relates to the process of extracting gold from its ores by means of a solution of cyanide of an alkali or alkaline earth, and has for its object to render the process more expeditious and considerably cheaper.

In extracting gold from its ores by means of a solution of cyanide of potassium, sodium, barium, etc., the simultaneous oxidation of the gold is necessary, and this has hitherto been effected by the action of the air upon the gold which is rendered oxidizable thereby by the action of the cyanide solution.

Instead of depending solely upon the agency of the air for the oxidizing action I employ, to assist the oxidation of the gold, ferricyanide of potassium or another ferricyanogen salt of an alkali or of an earth alkali in an alkaline solution. By this means the oxidation being rendered very much more energetic is effected with a considerably smaller quantity of the solvent. Thus, by the addition of ferricyanide of potassium or other ferricyanides to the cyanide of potassium solution, as much as eighty per cent. of potassium cyanide may be saved..

It may be remarked that the ferricyanide of potassium alone will not dissolve the gold and does not therefore come under

the category of a solvent hitherto employed in processes of extraction. It does not therefore render unnecessary the employment of the simple cyanide as a solvent, but only reduces the amount required owing to the capacity of the ferricyanide to assist the air to rapidly oxidize the gold in the presence of the simple salt. Consequently the cyanogen of the latter is not used to form the gold cyanide compound.

What I claim as my invention, and desire to secure by letters patent is—

The process of extracting gold from its ores consisting in subjecting the ores to the dissolving action of cyanide of potassium in the presence of ferricyanide of potassium, substantially as herein described.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

(1) R. S., Secs. 4888 to 4892.

Applications for letters patent of the United States must be made to the Commissioner of Patents, and must be signed by the inventor, if alive. A complete application comprises the first fee of \$15, a petition, specification, and oath; and drawings, model, or specimen when required. The petition, specification, and oath must be in the English language. P. O. Rule 30.

Witnesses are not required, according to 38 Stat. L. 958, Act of March 3, 1915, to specification or drawings.

No. 2138.

For a Machine.(1)

To all whom it may concern:

Be it known that I, —, a citizen of the United States, residing at —, in the county of —, and state of — [or subject, etc.], have invented a new and useful meat-chopping machine, of which the following is a specification:

My invention relates to improvements in meat-chopping machines in which vertically-reciprocating knives operate in conjunction with a rotating chopping block; and the objects of my improvement are, first, to provide a continuously-lubri-

cated bearing for the block; second, to afford facilities for the proper adjustment of the knives independently of each other in respect to the face of the block; and, third, to reduce the friction of the reciprocating rod which carries the knives.

I attain these objects by the mechanism illustrated in the accompanying drawing, in which—

Figure 1 is a vertical section of the entire machine; Fig. 2, a top view of the machine as it appears after the removal of the chopping block and knives; Fig. 3, a vertical section of a part of the machine on the line 1 2, Fig. 2; and Fig. 4, a detailed view in perspective of the reciprocating cross-head and its knives.

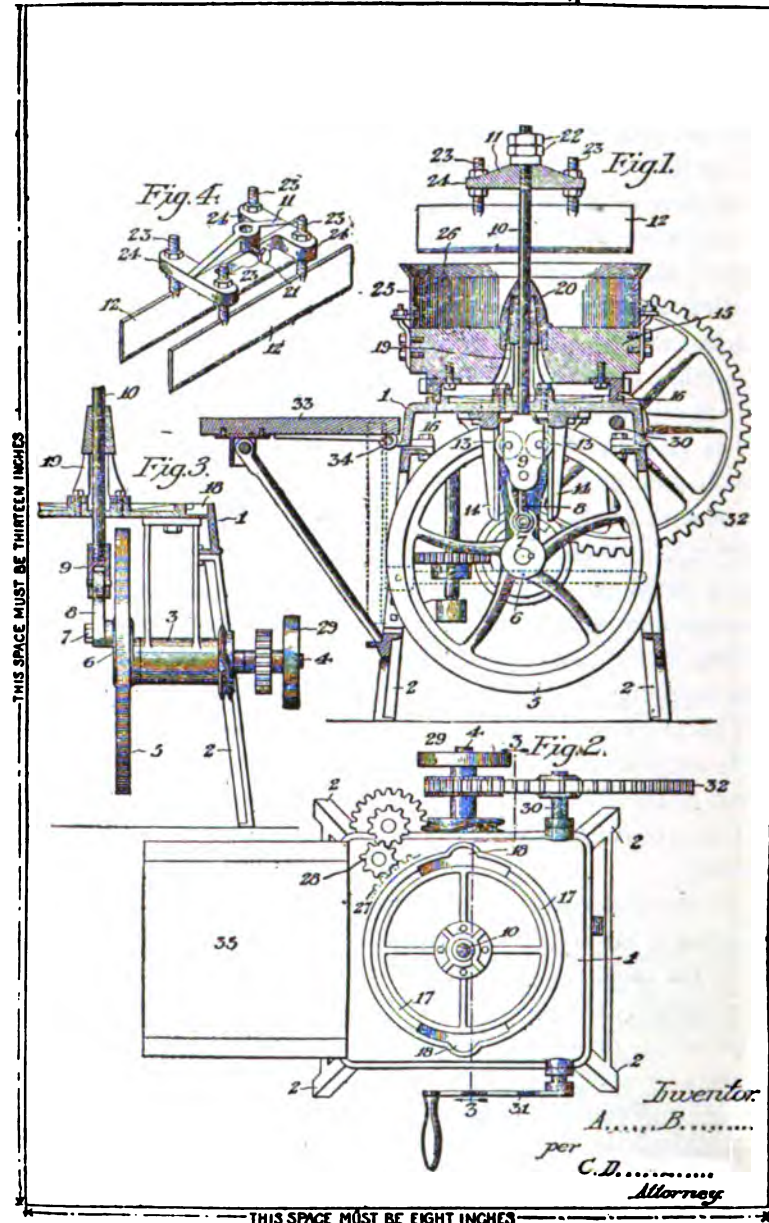
Similar numerals refer to similar parts throughout the several views.

The table or plate 1, its legs or standards 2 2, and the hanger 3, secured to the underside of the table, constitute the framework of the machine. In the hanger 3 turns the shaft 4, carrying a flywheel 5, to the hub of which is attached a crank 6, and a crank-pin 7, connected by a link 8, to a pin passing through a cross-head 9, and to the latter is secured a rod 10, having at its upper end a cross-head 11, carrying the adjustable chopping knives 12 12, referred to hereinafter.

The cross-head 9, reciprocated by the shaft 4, is provided with anti-friction rollers 13 13, adapted to guides 14 14, secured to the underside of the table 1, so that the reciprocation of this cross-head may be accompanied with as little friction as possible.

To the underside of a wooden chopping block 15 is secured an annular rib 16, adapted to and bearing in an annular groove 17 in the table 1. (See Figs. 1 and 2.) This annular groove or channel is not of the same depth throughout, but communicates at one or more points (two in the present instance) with pockets or receptacles 18, 18 wider than the groove and containing supplies of oil, in contact with which the rib 16 rotates, so that the continuous lubrication of the groove and rib is assured. The rod 10 passes through and is guided by a central

THE SIZE OF THE SHEET MUST BE EXACTLY
10 x 15 INCHES. SEE RULE 52.(b)



stand 19, secured to the table 1, and projecting through a central opening in the chopping block without being in contact therewith, the upper portion of the said stand being contained within a cover 20, which is secured to the block, and which prevents particles of meat from escaping through the central opening of the same.

The cross-head 11, previously referred to, and shown in perspective in Fig. 4, is vertically adjustable on the rod 10, and can be retained after adjustment by a set-screw 21, the upper end of the rod being threaded for the reception of nuts 22, which resist the shocks imparted to the cross-head when the knives are brought into violent contact with the meat or the chopping block.

The knives 12 12 are adjustable independently of each other and of the said cross-head, so that the coincidence of the cutting edge of each knife with the face of the chopping block may always be assured.

I prefer to carry out this feature of my invention in the manner shown in Fig. 4, where it will be seen that two screw-rods 23 23 rise vertically from the back of each knife and pass through lugs 24 24 on the cross-head, each rod being furnished with two nuts, one above and the other below the lug through which it passes. The most accurate adjustment of the knives can be effected by the manipulation of these nuts.

A circular casing 25 is secured to the chopping block, so as to form on the same a trough 26 for keeping the meat within proper bounds; and on the edge of the annular rib 16, secured to the bottom of the block, are teeth 27, for receiving those of a pinion 28, which may be driven by the shaft 4 through the medium of any suitable system of gearing, that shown in the drawing forming no part of my present invention.

This shaft 4 may be driven by a belt passing round the pulleys 29, or it may be driven by hand from a shaft 30, furnished at one end with a handle 31, and at the other with a cog-wheel 32, gearing into a pinion on the said shaft 4.

A platform 33 may be hinged, as at 34, to one edge of the table 1, to support a vessel in which the chopped meat can be deposited. The means by which it may be supported are shown in full lines, and the most convenient method of disposing of it when not in use is shown in dotted lines, in Fig. 1.

I am aware that prior to my invention meat-chopping machines have been made with vertically-reciprocating knives operating in conjunction with rotating chopping blocks. I therefore do not claim such a combination broadly; but

I claim:

1. The combination, in a meat-chopping machine, of a rotary chopping block having an annular rib, with a table having an annular recess to receive said rib, and a pocket communicating with the said recess, all substantially as set forth.

2. In a meat-chopping machine, the combination of a rotary chopping block with a reciprocating cross-head carrying knives, each of which is vertically adjustable on the cross-head independently of the other, substantially as described.

3. A chopping knife having two screw-rods projecting perpendicularly from its back and parallel with the sides of the knife.

4. A meat-chopping machine provided with a rod carrying chopping knives and adapted to be reciprocated, a cross-head secured to said rod, anti-friction rollers mounted on the cross-head, and guides with which the rollers co-operate, substantially as described.

(1) The following order of arrangement should be observed in framing the specification:

First. Preamble stating the name and residence of the applicant and the title of the invention.

Second. General statement of the object and nature of the invention.

Third. Brief description of the several views of the drawings (if the invention admits of such illustration).

Fourth. Detailed description.

Fifth. Claim or claims.

Sixth. Signature of inventor.

The specification must be signed by the inventor or by his executor or administrator. Full names must be given, and all names must be legibly written.

Two or more independent inventions can not be claimed in one application; but where several distinct inventions are dependent upon each other and mutually contribute to produce a single result they may be claimed in one application.

(2) As to drawings see Patent Office Rules 49 to 55.

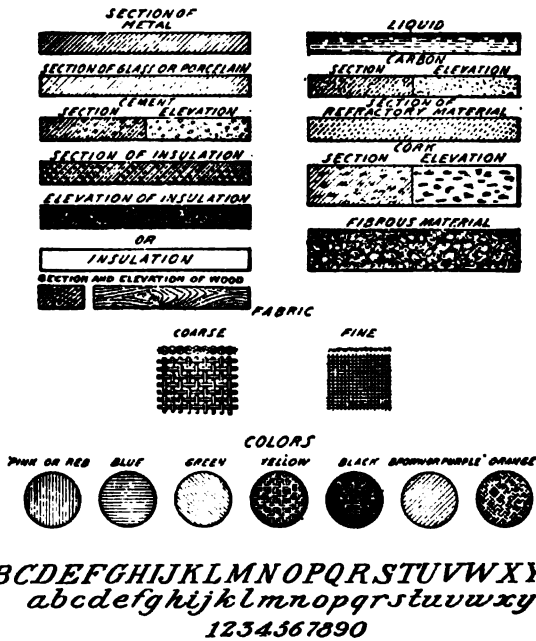
Drawings must be made upon pure white paper of a thickness corresponding to two-sheet or three-sheet Bristol-board. The surface of the paper must be calendered and smooth. India ink alone must be used, to secure perfectly black and solid lines.

The size of a sheet on which a drawing is made must be exactly 10 by 15 inches. One inch from its edges a single marginal line is to be drawn, leaving the "sight" precisely 8 by 13 inches. Within this margin all work and signatures must be included. One of the shorter sides of the sheet is regarded as its top, and, measuring downwardly from the marginal line, a space of not less than $1\frac{1}{4}$ is to be left blank for the heading of title, name, number, and date.

The Patent Office prescribes a chart for the use of draftsmen as follows:

UNITED STATES PATENT OFFICE. CHART FOR DRAFTSMEN.

SHEET 1.



ELECTRICAL SYMBOLS.

| | | | | | |
|--|---|--|------------------------------|-----------------------------------|------------------------------------|
| 1. CROSSING AND JOINED WIRES OPEN | 2. CROSSING AND JOINED WIRES CLOSE | 3. MAIN CIRCUITS SHUNT OR BY-PASSING CIRCUITS | 4. REVERSING SWITCH | 5. SWITCH | 6. KNIFE SWITCH |
| 7. DOUBLE POLE SWITCH | 8. POLE CHANGER | 9. RESISTANCE | 10. NON INDUCTIVE RESISTANCE | 11. IMPEDANCE | 12. RHEOSTAT |
| 13. INDUCTIVE RESISTANCE | 14. INDUCTIVE RESISTANCE ADJUSTABLE CORE | 15. INDUCTIVE RESISTANCE ADJUSTABLE COIL | 16. CONDENSER | 17. CONDENSER (ADJUSTABLE) | 18. COMPRESSIBLE PILE RESISTOR |
| 19. CIRCUIT BREAKER (UNDER NORMAL LOAD) | 20. FUSE | 21. LIGHTNING ARRESTER | 22. GROUND | 23. CIRCUIT BREAKER (OVERLOAD) | 24. CIRCUIT BREAKER (UNDERLOAD) |

ELECTRICAL SYMBOLS.

SHEET 2.

| | | | | | |
|---|--|---|--|---|--|
| 25. RELAY | 26. DIFFERENTIAL RELAY | 27. POLARIZED RELAY | 28. A.C. RELAY | 29. RETARDED RELAY | 30. RETARDED RELAY |
| 31. SHUNT | 32. GALVANOMETER | 33. VOLTMETER | 34. AMMETER | 35. WATTMETER | 36. HOT WIRE MEASURING INSTRUMENT |
| 37. INTEGRATING METER | 38. WATT-HOUR METER-2 WIRE | 39. WATT-HOUR METER-3 WIRE | 40. INCANDESCENT LAMP | 41. INCANDESCENT LAMP LIMITED OUT | 42. ELECTRIC ARC |
| 43. ARC LAMPS LIMITED OUT | 44. TELEPHONE SUBSTATION | 45. AUDION | 46. BELL | 47. POLARIZED BELL | 48. BUZZER |
| 49. ANNUNCIATORS | 50. DROP ANNUNCIATOR | 51. TRANSMITTERS | 52. RECEIVERS | 53. TELEPHONE HOOK | 54. SWITCH BOARD PLUG AND JACK |
| 55. LISTENING RINGING KEY | 56. TELEGRAPH KEY | 57. D.C. RELAY OR SOUNDER | 58. CONDENSER | 59. WAVE DETECTOR | 60. ELECTROLYTIC DETECTOR |
| 61. QUENCHED SPARK-GAP | 62. BATTERY | 63. THERMO-ELECTRIC GENERATOR | 64. ANTENNAE | 65. STORAGE CELL | 66. COMMUTATOR MOTOR OR GENERATOR |
| 67. COMMUTATION MOTOR OR GENERATOR (SERIES WOUND) | 68. COMMUTATION MOTOR OR GENERATOR (SHUNT WOUND) | 69. COMMUTATION MOTOR OR GENERATOR (COMPOUND WOUND) | 70. COMMUTATION MOTOR OR GENERATOR (COMPOUND WOUND) (REVERSIBLE) | 71. REPULSION MOTOR | 72. COMMUTATION THREE-PHASE INDUCTION MOTOR |
| 73. INDUCTION MOTOR-GENERATOR | 74. ROTARY CONVERTER (THREE-PHASE) | 75. SYNCHRONOUS MOTOR OR GENERATOR (THREE-PHASE) | 76. SYNCHRONOUS MOTOR OR GENERATOR (QUARTER-PHASE) | 77. INDUCTION MOTOR OR GENERATOR (SINGLE-PHASE) | 78. INDUCTION MOTOR OR GENERATOR (THREE-PHASE) |
| 79. INDUCTION MOTOR OR GENERATOR (SINGLE-PHASE) | 80. INDUCTION MOTOR OR GENERATOR (THREE-PHASE) | 81. FREQUENCY CHANGER (THREE-PHASE) | 82. TRANSFORMER | 83. AUTO TRANSFORMER | 84. SERIES TRANSFORMER |
| 85. MERCURY ARC RECTIFIER | 86. ASYMMETRIC CELL | 87. ADJUSTABLE TRANSFORMER COUPLING | 88. ADJUSTABLE TRANSFORMER | 89. SPARK GAP | |

No. 2139.**For a Composition of Matter.(1)**

To all whom it may concern:

Be it known that I, —, a citizen of —, residing at —, in the county of — and state of — [or subject of, etc.], have invented a new and useful non-conducting plastic composition, of which the following is a specification.

The object of my invention is the production of a plastic non-conducting composition or cement to be applied to the surfaces of steam boilers and steam pipes and other receptacles and conduits as a lagging for preventing radiation of heat and the permeation of water, and rendering them fireproof.

My composition consists of a mixture of paper pulp or other vegetable fibrous material, a powdered mineral filler, such as soapstone or Portland cement, a mineral fibrous material, such as asbestos, and a mineral cementing material, such as silicate of sodium or potassium (soluble glass).

In preparing the composition I prefer to use the ingredients in about the following proportions—viz., fifty pounds of paper pulp, fifty pounds of soapstone, twenty-five pounds of asbestos, and three quarts of a 33° Baumé solution of soluble glass. Good results may be obtained, however, when the ingredients are varied within the following limits: vegetable fibrous material, forty to sixty pounds; powdered mineral filler, forty-five to fifty-five pounds; mineral fibrous material, twenty to thirty pounds; soluble glass, two to four quarts of a 30° Baumé to 35° Baumé solution.

The asbestos may in some cases be omitted when a cheaper product is desired, though the composition is not then so efficient for the lagging of surfaces subjected to high temperatures.

These ingredients are mixed with a quantity of water sufficient to form a paste or mortar of such consistency as to enable it to be plastered over the surface to be protected. It may be applied in one or more coats or layers, in the ordinary manner, according to the nature of the article and the amount of protection required.

My composition is light, is fireproof, is a very efficient non-conductor of heat, is impervious to water, adheres without cracking when it dries to the surface to which it is applied, and, as a whole, possesses in a high degree all the desired properties of a lagging for steam-heated surfaces.

I claim:

1. A plastic composition adapted to form a light weight, fireproof, and waterproof lagging for steam-heated surfaces, comprising a vegetable fibrous material, a mineral filler in powdered form and a mineral cementing substance.

2. A plastic composition adapted to form a lagging for steam pipes and the like comprising forty to sixty pounds of paper pulp, forty-five to fifty-five pounds of powdered soapstone, and two to four quarts of a 30° Baumé to 35° Baumé solution of soluble glass.

3. A plastic composition consisting of a vegetable fibrous material, a powdered mineral filler, a mineral fibrous material and a mineral cementing substance substantially as described.

4. A plastic composition consisting of fifty pounds of paper pulp, fifty pounds of powdered soapstone, twenty-five pounds of asbestos fiber and three quarts of a 33° Baumé solution of soluble glass.

(1) R. S. U. S., Sec. 4890; Patent Office Rule 62.

No. 2140.

For a Design.(1)

To all whom it may concern:

Be it known that I, —, a citizen of the United States, residing at —, in the county of — and state of — [or subject. etc.], have invented a new, original, and ornamental design for watch cases, of which the following is a specification, reference being had to the accompanying drawing, forming part thereof.

The figure is a plan view of a watch case, showing my new design.

I claim:

The ornamental design for a watch case, as shown.

No. 2141.**For a Caveat.**

Law repealed by Act of July 1, 1910.

OATHS.**No. 2142.****By an Inventor.**_____,
_____, ss.

(1) _____, the above named petitioner, being sworn [*or affirmed*], deposes and says that _____, citizen of (2) _____ and resident of (3) _____; that _____ verily believes _____ to be the original, first, and (4) _____ inventor of the improvement in (5) _____ described and claimed in the annexed specification; that _____ does not know and does not believe that the same was ever known or used before _____ invention or discovery thereof, or patented or described in any printed publication in any country before _____ invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; and that no applications for patent on said improvement have been filed by _____ or _____ representatives or assigns in any country foreign to the United States, except as follows: (6) _____.

Inventor's full name:

(7) _____

Sworn to and subscribed before me this _____ day of _____,
19—.

[Signature of justice or notary.]

[Seal.]

(8) _____

[Official character.]

(1) If the inventor be dead, the oath will be made by the administrator; if insane, by the guardian, conservator, or legal representative. In either

(1) If the inventor be dead, the oath will be made by the administrator; if insane, by the guardian, conservator, or legal representative. In either case the affiant will declare his belief that the party named as inventor was the original and first inventor.

(2) If the applicant be an alien, state of what foreign country he is a citizen or subject.

(3) Give residence address in full; as "a resident of —, in the county of —, and state of —," or "of No. — street, in the city of —, county of —, and state (kingdom, republic, or empire) of —."

(4) "Sole" or "joint."

(5) Insert title of invention.

(6) Name each country in which an application has been filed, and in each case give the date of filing the same. If no application has been filed, erase the words "except as follows."

(7) All oaths must bear the signature of the affiant.

(8) * * * "When the person before whom the oath or affirmation is made is not provided with a seal, his official character shall be established by competent evidence, as by a certificate from a clerk of a court of record or other proper officer having a seal."

A certificate of the official character of a magistrate, stating date of appointment and term of office, may be filed in the Patent Office, which will obviate the necessity of separate certificates in individual cases.

When the oath is taken abroad before a notary public, judge or magistrate, his authority should in each instance be proved by a certificate of a diplomatic or consular officer of the United States.

No. 2143.

Oath to Accompany an Application for United States Patent for Design.

— — —, }
— — —, } ss.

—, (1) the above-named petitioner—, being sworn [or affirmed], depose— and say— that — citizen— of (2) — and resident— of (3) —, that — verily believe — to be the original, first and (4) — inventor of the design for (5) —, described and claimed in the annexed specification; that — do— not know and do— not believe that the same was ever known or used before — invention thereof, of patented or described in any printed publication in any country

before — invention thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said design has not been patented in any country foreign to the United States on an application filed by — or — legal representatives or assigns more than four months prior to this application; and that no application for patent on said design has been filed by — or — representatives or assigns in any country foreign to the United States, except as follows:
(6) —.

Inventor's full name: (7)

—
—
— —
— —

Sworn to and subscribed before me this — day of —,
19—. (8) —,

[Seal.]

[Signature of justice or notary.]

—,
[Official character.]

(1) If the inventor be dead, the oath will be made by the administrator; if insane, by the guardian, conservator, or legal representative. In either case the affiant will declare his belief that the party named as inventor was the original and first inventor.

(2) If the applicant be an alien, state of what foreign country he is a citizen or subject.

(3) Give residence address in full; as "a resident of —, in the county of —, and state of —," or "of No. — street, in the city of —, county of —, and state (kingdom, republic, or empire) of —."

(4) "Sole" or "joint."

(5) Insert title of invention.

(6) Name each country in which an application has been filed, and in each case give the date of filing the same. If no application has been filed, erase the words "except as follows."

(7) All oaths must bear the signature of the affiant.

(8) * * * "When the person before whom the oath or affirmation is made is not provided with a seal, his official character shall

be established by competent evidence, as by a certificate from a clerk of a court of record or other proper officer having a seal."

A certificate of the official character of a magistrate, stating date of appointment and term of office, may be filed in the Patent Office, which will obviate the necessity of separate certificates in individual cases.

When the oath is taken abroad before a notary public, judge or magistrate, his authority should in each instance be proved by a certificate of a diplomatic or consular officer of the United States.

No. 2144.

By an Applicant for a Reissue (Inventor).

(When the original patent is claimed to be inoperative or invalid "by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new," this form can be modified accordingly.)

_____,
_____, ss.

_____, the above-named petitioner, being duly sworn [*or affirmed*], deposes and says that he does verily believe himself to be the original, first, and (1) _____ inventor of the improvement set forth and claimed in the foregoing specification and for which improvement he solicits a patent; that deponent does not know and does not believe that said improvement was ever before known or used; that deponent is a citizen of the United States of America, and resides at _____, in the county of _____ and state of _____; (2) that deponent verily believes that the letters patent referred to in the foregoing petition and specification and herewith surrendered are inoperative [*or invalid*], for the reason that the specification thereof is defective [*or insufficient*], and that such defect [*or insufficiency*] consists particularly in (3) _____; and deponent further says that the errors which render such patent so inoperative [*or invalid*] arose from inadvertence [*or accident, or mistake*], and without any fraudulent or deceptive intention on

the part of deponent; (4) that the following is a true specification of the errors which it is claimed constitute such inadvertence [*or* accident, *or* mistake] relied upon: (3) —; that such errors so particularly specified arose [*or* occurred] as follows: (3) —.

Inventor's full name:

Subscribed and sworn to before me this — day of —, 19—.

[*Seal.*]

[Signature of justice or notary.]

[Official character.]

- (1) "Sole" or "joint."
- (2) Rule 46.
- (3) Rule 87.
- (4) Rule 87(5).

No. 2145.

By an Applicant for a Reissue (Assignee).(1)

_____,
_____, ss.

_____, the above named petitioner, being duly sworn [*or* affirmed], deposes and says that he verily believes that the aforesaid letters patent granted to — are [*here follows Form No. —, the necessary changes being made*]; that the entire title to said letters patent is vested in him; and that he verily believes the said — to be the first and original inventor of the invention set forth and claimed in the foregoing amended specification; and that the said — is now deceased.

Sworn to and subscribed before me this 14th day of November, 19—.

[Signature of justice or notary.]

[Official character.]

(1) This form is to be used only when the inventor is dead.

No. 2146.**Supplemental Oath to Accompany a Claim for Matter Disclosed but not Claimed in an Original Application.**

_____,
 _____, ss.

_____, whose application for letters patent for an improvement in _____, serial No. _____, was filed in the United States Patent Office on or about the _____ day of _____, 19____, being duly sworn [*or affirmed*], deposes and says that the subject-matter of the foregoing amendment was part of his invention, was invented before he filed his original application, above identified, for such invention, was not known or used before his invention, was not patented or described in a printed publication in any country more than two years before his application, was not patented in a foreign country on an application filed by his legal representatives or assigns more than twelve months before his application, was not in public use or on sale in this country for more than two years before the date of his application, and has not been abandoned.

Sworn to and subscribed before me this _____ day of _____, 19____.

[SEAL]

_____,
 [Signature of justice or notary.]

_____,
 [Official character.]

No. 2147.**Oath as to the Loss of Letters Patent.**

_____,
 _____, ss.

_____, being duly sworn [*or affirmed*], doth depose and say

that the letters patent No. —, granted to him, and bearing date on the — day of —, 18—, have been either lost or destroyed; that he has made diligent search for the said letters patent in all places where the same would probably be found, if existing, and that he has not been able to find them.

Subscribed and sworn to before me this — day of —,
19—.

[Signature of justice or notary.]

[Official character.]

No. 2148.

Oath of Administrator as to the Loss of Letters Patent.

—, —,
—, ss.

—, being duly sworn, doth depose and say that he is administrator of the estate of —, deceased, late of —, in said county; that the letters patent No. —, granted to said —, and bearing date of the — day of —, 18—, have been lost or destroyed, as he verily believes; that he has made diligent search for the said letters patent in all places where the same would probably be found, if existing, and especially among the papers of the decedent, and that he has not been able to find said letters patent.

—,
Administrator, etc.

Subscribed and sworn to before me this — day of —,
19—.

[Signature of justice or notary.]

[Official character.]

No. 2149.**Power of Attorney after Application Filed.**

To the Commissioner of Patents:

The undersigned having, on or about the — day of —, 18—, made application for letters patent for an improvement in — (serial number —), hereby appoints — (2) of —, in the county of — and state of —, his attorney, with full power of substitution and revocation, to prosecute said application, to make alterations and amendments therein, to receive the patent, and to transact all business in the patent office connected therewith.

Signed at —, in the county of —, state of —, this — day of —, 19—.

—.

(1) If the power of attorney be given at any time other than that of making application for letters patent, it will be in substantially the above form.

(2) If the power of attorney be to a firm, the name of each member of the firm must be given in full.

—

No. 2150.**Revocation of Power of Attorney.**

To the Commissioner of Patents:

The undersigned having, on or about the — day of —, 18—, appointed —, of —, in the county of — and state of —, his attorney to prosecute an application for letters patent, which application was filed on or about the — day of —, 18—, for an improvement in — (serial number —), hereby revokes the power of attorney then given.

Signed at —, in the county of —, state of —, this — day of —, 19—.

—.

No. 2151.**Amendment (1).**

To the Commissioner of Patents:

In the matter of my application for letters patent for an improvement in —, filed —, 18— (serial number —), I hereby amend my specification as follows:

By striking out all between the — and — lines, inclusive of page —;

By inserting the words “—,” after the word “—,” in the — line of the — claim; and

By striking out the — claim and substituting therefor the following:

Signed at —, in the county of —, and state of —.

—,
By —,

His Attorney in Fact.

(1) In the preparation of all amendments a separate paragraph should be devoted to each distinct erasure or insertion, in order to aid the office in making the entry of the amendment into the case to which it pertains.

DISCLAIMERS.

No. 2152.

Disclaimer After Patent Issued.(1)

To the Commissioner of Patents:

Your petitioner, —, a citizen of the United States, residing at —, in the county of — and state of — [or subject, etc.], represents that in the matter of a certain improvement in —, for which letters patent of the United States No. — were granted to —, on the — day of —, 18—, he is [*here state the exact interest of the disclaimant; if assignee, set out liber and page where assignment is recorded*], and that he has reason to believe that through inadvertence [accident or mistake] the specification and claim of said letters patent are too broad, including that of which said patentee was not the first inventor. Your petitioner, therefore, hereby enters this disclaimer to that part of the claim in said specification which is in the following words, to wit:

Signed at —, in the county of —, state of —, this — day of —, 18—.

Witnesses:

—.
—.

(1) See P. O. Rules 181 and 182.

No. 2153.

Disclaimer During Interference.(1)

Interference.

vs. } Before the examiner of interferences.

Subject matter: _____

To the Commissioner of Patents:

Sir: In the matter of the interference above noted, under the provisions of and for the purpose set forth in Rule 107, I disclaim [*set forth the matter as given in declaration of interference*], as I am not the first inventor thereof, and I herewith transmit an amendment to my application filed _____, 18— serial number _____, for the purpose of having the above disclaimer embodied as part of my specification.

Signed at _____, in the county of _____, state of _____, this _____ day of _____, 19—.

Witnesses:

(1) See P. O. Rules 107, 181 and 182.

ASSIGNMENTS.

No. 2154.

Assignment of an Entire Interest in an Invention before the Issue of Letters Patent (1).

Whereas I, —, of —, county of —, and state of —, have invented a certain new and useful improvement in —, for which I am about to make application for letters patent of the United States; and whereas —, of —, county of —, and state of —, is desirous of acquiring an interest in said invention and in the letters patent to be obtained therefor:

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of — dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said —, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said — the full and exclusive right to the said invention, as fully set forth and described in the specification prepared and executed by me on the — day of —, 18—, preparatory to obtaining letters patent of the United States therefor; and I do hereby authorize and request the commissioner of patents to issue the said letters patent to the said — as the assignee of my entire right, title, and interest in and to the same, for the sole use and behoof of the said — and his legal representatives.

In testimony whereof I have hereunto set my hand and affixed my seal this — day of —, 19—.

— [Seal.]

In presence of—

—.

—.

(1) R. S. sec. 4898.

Every patent or any interest therein is assignable in law by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under the patent to the whole or any specified part of the United States.

Interests in patents may be vested in assignees, in grantees of exclusive sectional rights, in mortgagees and in licensees. *Waterman v. Mackenzie*, 138 U. S. 252, 255.

First. An assignee is a transferee of the whole interest of the original patent or of an undivided part of such whole interest, extending to every portion of the United States. The assignment must be written or printed and duly signed.

Second. A grantee acquires by the grant the exclusive right, under the patent, to make and use, and to grant to others the right to make and use, the thing patented within and throughout some specified part of the United States, excluding the patentee therefrom. The grant must be written or printed and be duly signed.

Third. A mortgage must be written or printed and be duly signed.

Fourth. A licensee takes an interest less than or different from either of the others. A license may be oral, written, or printed, and if written or printed, must be duly signed.

An assignment, grant, or conveyance of a patent will be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice unless recorded in the Patent Office within three months from the date thereof. P. O. Rules 183 to 189.

If any such assignment, grant, or conveyance of any patent shall be acknowledged before any notary public of the several states or territories or the District of Columbia, or any commissioner of the United States Circuit Court, or before any secretary of legation or consular officer authorized to administer oaths or perform notarial acts under section seventeen hundred and fifty of the Revised Statutes, the certificate of such acknowledgment, under the hand and official seal of such notary or other officer, shall be prima facie evidence of the execution of such assignment, grant, or conveyance. Act of March 3, 1897, 29 Stat. L. 692.

That an assignment may be made before patent issues see *Gayler v. Wilder*, 10 How. 477; *R. R. Co. v. Trimble*, 10 Wall. 367; P. O. Rules 186 and 188.

See *Robinson on Patents*, Vol. II, Secs. 766, 805; *Ball v. Coker*, 168 Fed. 304; *Newton v. Buck*, 72 Fed. 777, 75 O. G. 673; *Underfeed Stoker Co. v. Amer. Ship Windlass Co.*, 185 Fed. 65; *Blackledge v. Weir Co.*, 108 Fed. 71, 95 O. G. 275; *Waterman v. Mackenzie*, 138 U. S. 252, 54 O. G. 1562.

No. 2155.

Of the Entire Interest in Letters Patent.

Whereas I, —, of —, county of —, state of —, did obtain letters patent of the United States for an improvement in —, which letters patent are numbered —, and bear date the — day of —, 19—; and whereas I am now the sole owner of said patent; and whereas —, of —, county of —, and state of —, is desirous of acquiring the entire interest in the same:

Now, therefore, in consideration of the sum of — dollars, the receipt of which is hereby acknowledged, I, —, by these presents do sell, assign, and transfer unto the said —, the whole right, title, and interest in and to the said letters patent therefor aforesaid, the same to be held and enjoyed by the said —, for his own use and behoof, and for his legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed — day of —, 19—.

In presence of—

—,
[L. S.]..

See note under Form 2154.

No. 2156.

Of an Undivided Interest in Letters Patent.

Whereas I, —, of —, county of —, state of —, did obtain letters patent of the United States for an improvement in —, which letters patent are numbered —, and bear date of — day of —, —; and whereas —, of —, county of —, state of —, is desirous of acquiring an interest in the same:

Now, therefore, in consideration of the sum of — dollars, the receipt of which is hereby acknowledged, I, —, by these presents do sell, assign, and transfer unto the said — the undivided one-half part of the whole right, title, and interest in and to the said invention and in and to the letters patent therefor aforesaid; the said undivided one-half part to be held by —, for his own use and behoof, and his legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed — day of —, 19—.

In presence of—

—,
[L. S.]

See note under Form 2154.

No. 2157.

Territorial Interest After Grant of Patent.(1)

Whereas I, —, of —, county of —, state of —, did obtain letters patent of the United States for improvement in —, which letters patent are numbered —, and bear date the — day of —, in the year 18—; and whereas I am now the sole owner of the said patent and of all rights under the same in the below recited territory; and whereas —, of —, county of —, state of —, is desirous of acquiring an interest in the same:

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of — dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the said —, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer unto the said — all the right, title, and interest in and to the said invention, as secured to me by said letters patent, for, to, and in the state of —, and for, to, or in no other place or places and to all

rights of recovery for past infringement within said territory the same to be held and enjoyed by the said — within and throughout the above specified territory, but not elsewhere, for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal at —, in the county of —, and state of —, this — day of —, 19—. — [SEAL.]

In presence of—

—.

—.

(1) See note under Form No. 2154.

No. 2158.

License—Shop-Rights.

In consideration of the sum of — dollars, to be paid by the firm of —, of —, in the county of —, state of —, I do hereby license and empower the said — to manufacture in said — [or other place agreed upon] the improvement in —, for which letters patent of the United States No. — were granted to me the — day of —, in the year —, and to sell the machines so manufactured throughout the United States to the full end of the term for which said letters patent are granted.

Signed at —, in the county of —, state of —, this — day of —, 19—. —.

In presence of—

—.

—.

No. 2159.

License—Not Exclusive—With Royalty.

This agreement, made this — day of —, 19—, between —, of —, in the county of — and state of —, party

of the second part, witnesseth, that whereas letters patent of the United States No. —, for an improvement in —, were granted to the party of the first part on the — day of —, 19—; and whereas the party of the second part is desirous of manufacturing — containing said patented improvement: Now, therefore, the parties have agreed as follows:

First. The party of the first part hereby licenses and empowers the party of the second part to manufacture, subject to the conditions hereinafter named, at their factory in —, and in no other place or places, to the end of the term for which said letters patent were granted, — containing the patented improvements, and to sell the same within the United States.

Second. The party of the second part agrees to make full and true returns to the party of the first part, under oath, upon the first days of — and — in each year, of all — containing the patented improvements manufactured by them.

Third. The party of the second part agrees to pay to the party of the first part — dollars as a license fee upon every — manufactured by said party of the second part containing the patented improvements; provided, that if the said fee be paid upon the days provided herein for semi-annual returns, or within — days thereafter, a discount of — per cent. shall be made from said fee for prompt payment.

Fourth. Upon a failure of the party of the second part to make returns or to make payment of license fees, as herein provided, for — days after the days herein named, the party of the first part may terminate this license by serving a written notice upon the party of the second part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of the service of said notice.

In witness whereof the parties above named have hereunto set their hands the day and year first above written at —, in the county of — and state of —.

In presence of—

—.

—.

—.

—.

DEPOSITIONS.

No. 2160.

Notice of Taking Testimony.

In the United States Patent Office.

—, 19—.

In the matter of the interference between the application of
— for a — machine and the patent No. —, granted
—, 19—, to —, now pending before the Commis-
sioner of Patents.

Sir: You are hereby notified that on Wednesday, —,
19—, at the office of —, Esq., No. — street, —, at —
o'clock in the forenoon, I shall proceed to take the testimony
of —, and —, all of —, as witnesses in my behalf.

The examination will continue from day to day until com-
pleted. You are invited to attend and cross-examine.

By —, His Attorney.

Signed at —, in the county of —, state of —, this
— day of —, 19—.

Witnesses:

—.
—.

PROOF OF SERVICE.

— —,
— —, ss.

Personally appeared before me, a — [or other officer],
the above named —, who, being duly sworn, deposes and
says that he served the above notice upon —, the attorneys
of the said —, at — o'clock — of the — day of —,

19—, by leaving a copy at his office in —, in the county of — and state of —, in charge of —.

Sworn to and subscribed before me at —, in the county of — and state of —, this — day of —.

[Official character.]

(Service may be acknowledged by the party upon whom it is made as follows:

Service of the above notice acknowledged this — of —, 19—.

By —, His Attorney.)

No. 2161.

Form of Deposition.

[Caption.]

Before the commissioner of patents, in the matter of the interference between the application of — for a — and letters patent No. —, granted —, to —.

Depositions of witnesses examined on behalf of —, pursuant to the annexed notice, at the office of —, No. — street —, on —. Present, —, Esq., on behalf of —, and —, Esq., on behalf of —.

—, being duly sworn [*or affirmed*], doth depose and say, in answer to interrogatories proposed to him by —, Esq., counsel for —, as follows, to-wit:

Question 1. What is your name, age, residence, and occupation?

Answer 1. My name is —; I am — years of age; I am a manufacturer of — and reside at —, in the state of —.

Question 2, etc.

And in answer to cross interrogatories proposed to him by —, Esq., counsel for —, he said:

Cross question 1. How long have you known —?

Answer 1. —.

2161a.**Stipulation as to Testimony of a Witness Not Called and
Examined.**

[*Caption.*]

It is stipulated by and between counsel for the respective parties hereto that if K. M., of Chicago, Illinois, were called and examined as a witness for the party D. R., he would testify to the following effect:

That he is an engineer with offices in the Monadnock Building, Chicago, Illinois, and that he has specialized to a great extent in telephone engineering; that he is a graduate of Cornell University in electrical engineering; that after graduating from Cornell in 1893, he was employed in the United States Patent Office as Assistant Examiner in the telephone division until 1896; that after leaving the Patent Office in 1896, he was made chief electrician of the Western Telephone Construction Company, at Chicago, and in May, 1899, entered the employ of the Kellogg Switchboard & Supply Company, where he remained for about five years; that in 1904 he became a consulting engineer, although he has devoted a great deal of time to patent matters; that he has written many patent specifications, and is the author of "American Telephone Practice," which has passed through many editions and is a standard treatise on this subject; that he is a vice-president of the Western Society of Engineers, a member of the American Institute of Electrical Engineers and of other engineering and scientific bodies; that for some years past until just recently he was president of the firm of M. & M.; that he is and has been familiar for many years with automatic telephone practice, and has made many studies of automatic and other telephone exchanges throughout the United States.

That he is acquainted with D. R., of Sioux City, Iowa, and that on July 15, 1910, said D. R. and Mr. M. G. called on him by appointment at his office in the Monadnock Building, Chicago, Illinois, at which time Mr. D. R. disclosed to him two

drawings and explained to him his invention illustrated in these drawings; that he has examined D. R.'s Exhibits 1 and 2, and believes that these are the drawings shown to him at that time; that after Mr. D. R. disclosed these drawings to him, he turned him over to L. S. K., who was associated with him at that time, for the purpose of having Mr. K. investigate and prepare for a report on the advisability of filing patent applications on D. R.'s invention; that he has fixed this date of July 15, 1910, by an entry appearing in his office diary, which is the regular permanent office book in which all entries were made showing the time of conferences with and work done for clients; that the entries in said diary are in chronological order, and that in said diary he finds an entry in its regular place, according to date, reading, "July 15, 1910, Mr. G. and Mr. D. R. called at 8:30 by appointment"; that he has examined his said office diary and finds further regular entries therein referring to D. R.'s invention and appearing under the dates of September 15, 1910; October 11, 1910; October 12, 1910; October 13, 1910, and an entry of October 17, 1910, reading, "Mr. M. 1 hr. Dictating letter to Mr. G. regarding D. R. invention"; that he has examined the correspondence, "D. R.'s Exhibit No. 11, Correspondence of Mr. M. G.," and that Mr. G.'s letter of June 29, 1910, forming a part of said exhibit and which was received at the time written, refers to this interview which was had on July 15, 1910; he finds the second entry in his office diary relating to D. R.'s invention appears under date of September 2, 1910, and reads, "Mr. K. 2 hrs. with Mr. D. R. on Automatic Telephone Switch," which means that Mr. K. spent two hours with Mr. D. R. that day; that he has examined the correspondence, "D. R.'s Exhibit No. 8, Correspondence Produced by D. R.," and finds therein his (M.'s) letter of October 17, 1910, written to M. G. at Sioux City, Iowa; that said letter was written by him and the report referred to therein is the report in evidence as "D. R.'s Exhibit No. 7, M. & M.'s Report," which report was studied by him at the time the said letter of October 17, 1910,

was written, concurring in the said report which was written by L. S. K., under M.'s instructions; that he has read the letter of October 19, 1910, forming a part of D. R.'s Exhibit No. 8, and that said letter was written by him (M.) on the date appearing therein, that is, October 19, 1910; that at the time he wrote his letter of October 17, 1910, to Mr. G., approving the report, he read the report and considered it before writing said letter; and that he has no interest in the outcome of this interference.

No. 2162.

Certificate of Officer.(1)

_____,
_____, ss.

I, _____, a notary public within and for the county of _____ and state of _____ [or other officer, as the case may be], do hereby certify that the foregoing deposition of _____ was taken on behalf of _____ in pursuance of the notice hereto annexed, before me, at _____, in the city of _____, in said county, on the _____ day [or days] of _____; that said witness was by me duly sworn before the commencement of his testimony; that the testimony of said witness was written out by myself [or by _____ in my presence]; that the opposing party, _____, was present [or absent or represented by counsel] during the taking of said testimony; that said testimony was taken at _____, and was commenced at _____ o'clock _____ on the _____ day of _____, 19____, was continued pursuant to adjournment on the _____, (etc.) and was concluded on the _____ of said month; that the deposition was read by, or to, each witness, before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at —, in said county, this — day of —, 19—.

[Signature of justice or notary.]

[Official character.]

(The magistrate will then append to the deposition the notice under which it was taken, and will seal up the testimony and direct it to the commissioner of patents, placing upon the envelope a certificate in substance as follows:

I hereby certify that the within deposition of — [*if the package contains more than one deposition give all the names*], relating to the matter of interference between — and —, was taken, sealed up, and addressed to the commissioner of patents by me this — day of —, 19—.)

[Signature of justice or notary.]

[Official character.]

(1) This certificate should follow and be attached to the deposition.

APPEALS AND PETITIONS.

No. 2163.

From a Principal Examiner to the Examiners-in-Chief.(1)

To the Commissioner of Patents:

Sir: I hereby appeal to the examiners-in-chief from the decision of the principal examiner in the matter of my application for letters patent for an improvement in —, filed —, 19—, serial number —, which on the — day of —, 19—, was rejected the second time. The following are the points of the decision on which the appeal is taken: [*Here follows a statement of the points on which the appeal is taken.*]

Signed at —, in the county of —, state of —, this — day of —, 19—.

(1) R. S., Sec. 4909; P. O. Rules 133 to 150.

No. 2164.

From the Examiner in Charge of Interferences to the Examiners-in-Chief.

To the Commissioner of Patents:

Sir: I hereby appeal to the examiners-in-chief from the decision of the examiner of interferences in the matter of the interference between my applications for letters patent for improvement in — and the letters patent of —; in which priority of invention was awarded to said —. The following are assigned as reasons of appeal: [*Here should follow an explicit statement of alleged errors in the decision of the examiner of interferences.*]

Signed at —, in the county of —, state of —, this
— day of —, 19—.

No. 2165.

**From the Examiners-in-Chief to the Commissioner in Ex
Parte Cases.**

To the Commissioner of Patents:

Sir: I hereby appeal to the commissioner in person from the decisions of the examiners-in-chief in the matter of my application for letters patent for an improvement in —, filed —, 19—, serial number —. The following are assigned as reasons of appeal: [*Here follow the reasons as in Form —.*]

Signed at —, in the county of —, state of —, this
— day of —, 19—.

No. 2166.

**From the Examiners-in-Chief to the Commissioner in
Interference Cases.**

To the Commissioner of Patents:

Sir: I hereby appeal to you in person from the decision of the examiners-in-chief, made —, 19—, in the interference between my application for letters patent for improvement in — and the letters patent of —, in which priority of invention was awarded to said —. The following are assigned as reasons of appeal. [*Here should follow an explicit statement of the alleged errors in the decision of the examiners-in-chief.*]

Signed at —, in the county of —, and state of —, this
— day of —, 19—.

No. 2167.

Petition from a Principal Examiner to the Commissioner.

| | | |
|---|---|---|
| In the United States Patent Office. Application of —. | } | Serial number —. Subject of invention —. |
|---|---|---|

To the Commissioner of Patents:

Your petitioner avers—

First. That he is the applicant above named.

Second. That said application was filed on the — day of —, 19—.

Third. That when so filed said application contained — claims.

Fourth. That your petitioner was informed by office letter of the —, 19—, (1) that his — claim was rendered vague and indefinite by the employment of the words “—,” which words should be erased; (2) that his — claim was met by certain references which were given; and (3) that the — claim was mere surplusage and should be eliminated.

Fifth. That on the — day of — your petitioner filed an amendment so eliminating his — claim, and accompanied such amendment with a communication in which he declined to amend such — claim, and asked for another action thereon.

Sixth. That your petitioner was then informed by office letter of the — day of — that the former requirement relating to claim — would be adhered to, and that no action would be had on the merits of either claim until said amendment so required had been made.

Wherefore your petitioner requests that the examiner in charge of such application be advised that such amendment so required by him to said — claim be not insisted upon, and directed to proceed to examine both said remaining claims upon their merits.

A hearing of this petition is desired on the — day of —, 19—.

—,
Applicant.

—,
Attorney for Applicant.

No. 2168.

Petition for Copies of Rejected and Abandoned Applications.(1)

In the United States Patent Office.

To the Commissioner of Patents:

The petition of —, a resident of —, in the county of — and state of —, respectfully shows:

First. That on the — day of —, 19—, patent No. —, issued to one —.

Second. That your petitioner is informed and believes that on the — day of —, 19—, said patentee filed in the United States patent office an application for patent for improvement in —.

Third. That your petitioner verily believes that said application has not been prosecuted during the past two years and upward; and he also verily believes that the last action had therein was on or about the — day of —, 19—.

Fourth. That said application has therefore become and now stands abandoned.

Fifth. That on the — day of —, 19—, said patentee began suit, in the Circuit Court of the United States for the — District of —, against your petitioner, which suit is based upon said patent, and the same is now pending and undetermined.

Sixth. Your petitioner is informed and believes that to enable him to prepare and conduct his defense in such suit it is

material and necessary that he be allowed access to and copies of the files of such abandoned case.

Seventh. Your petitioner therefore requests that he or —, in his behalf and as his attorney, be permitted to inspect and be furnished copies of all or any portion of such case.

—, Petitioner.
—, ss. By —, His Attorney.

On this — day of —, 19—, before me, a notary public in and for said county and state, personally appeared —, the above named attorney, who, being by me duly sworn, deposes and says that he has read the foregoing petition and knows its contents, and that the same is true, except as to the matters therein stated on information, or belief, and as to those matters he believes it to be true.

—,
Notary Public.

(1) A copy of this petition must be served upon the applicant named in the abandoned application or upon his attorney of record.

No. 2169.

Preliminary Statement of Domestic Inventor (1).
In the United States Patent Office.

— } Interference in the United States Patent Office.
vs. } Preliminary statement of —.
— }

—, of —, in the county of —, and state of —, being duly sworn [*or affirmed*], doth depose and say that he is a party to the interference declared by the commissioner of patents, —, 19—, between —'s application for letters patent, filed — 19—, serial number —, and the patent to —, granted —, 19—, numbered —, for a —; that he conceived the invention set forth in the declaration of interference (1) on or about the — day of —, 19—; that on or about the — day of —, 19—, he first made drawings of the invention [*if he has not made a drawing, then he should*

say that no drawing of the invention in issue has been made]; that on or about the — day of —, 19—, he first explained the invention to others; that he first embodied his invention in a full-sized machine, which was completed about the — day of —, 19—, and that on the — day of —, 19—, the said machine was first successfully operated, in the town of —, county of —, and state of —, and that he has since continued to use the same, and that he has manufactured others for use and sale to the following extent, viz: *[If he has not embodied the invention in a full-sized machine, he should so state, and if he has embodied it, but has not used it, he should so state.]*

Subscribed and sworn to before me this — day of —, 19—.

[Signature of justice or notary.]

[Official character..]

(1) If the party has doubts as to whether the matter of his application is properly involved in the issue as declared, then in lieu of the terms "the invention set forth in the declaration of interference," he may say "the invention contained in the claims of my application (or patent) declared to be involved in this interference," and should specify such claims by number.

No. 2170.

Preliminary Statement of Foreign Inventor.(1)

IN THE UNITED STATES PATENT OFFICE.

— } Preliminary Statement of —.
vs. } Interference in United States Patent Office.
 — }

—, of London, in the county of Middlesex, England, being duly sworn, doth depose and say that he is a party to the interference declared by the commissioner of patents, —, 19—, between his application for patent, filed —, 19—,

serial number —, and the patent of —, granted —, 19—, No. — for an improvement in —; that he made the invention set forth in the declaration of interference, (1) being at that time in England; that patents for such invention, were applied for and obtained as follows:

Application filed in Great Britain, —, 19—, patent dated —, 19—, No. —; published the — day of —, 19—, and sealed the — day of —, 19—; application filed in France —, 19—, patent dated —, 19—, No. —; published the — day of —, 19—, and sealed the — day of —, 19—. [*If a patent has not been obtained in any country it should be so stated.*]

That such invention was fully described in a magazine published at —, on the — day of —, 19—, by —, entitled — (see page of — such magazine), and in the following newspapers: —, of —, 19—; —, published at —, on —, 19—. [*If the invention was never described in a printed publication it should be so stated.*]

The knowledge of such invention was introduced into the United States under the following circumstance: On —, 19—, the said — wrote a letter to —, residing at —, state of —, describing such invention and soliciting his services in procuring a patent therefor in the United States. This letter he is informed and believes, was received by the said — on —, 19—. Also on —, 19—, he wrote a letter to the firm of —, of —, state of —, describing such invention and requesting their assistance in manufacturing and putting it on the market, which letter, he is informed and believes, was received by them on —, 19—. Such invention was manufactured by such firm and described in their trade circulars, as he is informed and verily believes, on or about the — day of —, 19—. [*If the invention has not been introduced into the United States otherwise than by the application papers, it should be so stated, and the date at which such papers were received in the United States alleged.*]

Subscribed and sworn to before me this — day of —,
19—.

[Signature of justice or notary.]

[Official character.]

(1) If the party has doubts as to whether the matter of his application is properly involved in the issue as declared, then in lieu of the terms "the invention set forth in the declaration of interference," he may say "the invention contained in the claims of my application (or patent) declared to be involved in this interference," and should specify such claims by number.

No. 2171.

Notice of Interference No. 33832.(1)

IN THE UNITED STATES PATENT OFFICE.

Before the Examiner of Interferences.

Department of Interior.

UNITED STATES PATENT OFFICE.

Washington, D. C., Oct. 10, 1911.

Charles T. Coe,
c/o A. N.,
132 Nassau St.,
New York, N. Y.

INTERFERENCE No. 33832

Please find below a copy of a communication from the Examiner concerning your application No. 631105, filed June 3, 1911, for Blowers for Boilers.

Very respectfully,

E. B. MOORE,
Commissioner of Patents.

Your case, above referred to, is adjudged to interfere with others, hereafter specified, and the question of priority will be determined in conformity with the Rules.

The statement demanded by Rule 110 must be sealed up and filed on or before the 13th of November, 1911, with the

subject to the invention, and name of party filing it, endorsed on the envelope:

The subject matter involved in the interference is:

Count 1. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, there being a vertical supply pipe to which said nozzles are suitably connected.

Count 2. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, there being a wall for enclosing said boiler having a vertical opening in one side thereof and a vertical supply pipe disposed at said opening, suitably connected with said nozzles.

Count 3. In a soot blower for water tube boilers having inclined tubes, a set of nozzles arranged one above the other in vertical series, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical series arrangement thereof, and means for moving the said nozzles toward and away from the boiler.

Count 4. In a soot blower for water tube boilers having inclined tubes, a vertical header, a set of movable nozzles for said vertical header, arranged one above the other, and means for causing said nozzles to follow the direction of the tubes, whereby said nozzles swing in planes oblique to the said vertical header.

The interference involves your application above identified and,

An application for Blowers for Water Tube Boilers, filed by Harry A. Higgins, c/o Diamond Power Specialty Co., Detroit, Mich., whose attorneys are Barthel & Barthel, 37

West Congress St., Detroit, Mich., and whose assignee is the Diamond Power Specialty Co., of Detroit, Mich., and

An application for water tube soot blowers, filed by Gideon Pillow Brown, 1316 Fisher Building, Chicago, Ill., whose attorneys are Bulkley and Durand, Fisher Building, Chicago, Ill.

The relation of the counts of the interference to the claims of the respective parties is as follows:

| Counts | Coe | Bayer & Brown | Higgins | Brown |
|--------|-----|---------------|---------|-------|
| 1 | 16 | 5 | 10 | 9 |
| 2 | 17 | 6 | 11 | 10 |
| 3 | 18 | 7 | 12 | 11 |
| 4 | 19 | 8 | 13 | 12 |

(1) From the record in *Brown v. Coe*, 44 App. D. C. 455.

No. 2172.

Motion to Extend Time for Filing Preliminary Statement. (1)

(Entitle in the United States Patent Office, before the Examiner of Interferences, and give Style and Interference Number.)

A. B., one of the parties to the above entitled interference by R. S., his attorney, moves that the time for filing his preliminary statement herein be extended for fifteen days after the 25th of September, 1919, the date hereinbefore fixed, and presents the following as his reasons for asking said extension, to-wit: [*Here state reasons in detail.*]

R. S.,
Attorney for A. B.

Notice of the above motion is hereby acknowledged at —, —, on this 22d day of September, 1919.

M. N.,
Attorney for [other party].

(1) See P. O. Rule 104. For interferences generally see P. O. Rules 93 to 132 inclusive.

No. 2173.

Motion to Amend Preliminary Statement.(1)

(Entitle in the United States Patent Office, before the Examiner of Interferences, and give Style and Interference Number.)

A. B., party to the above mentioned interference, by his attorney, R. S., moves the examiner for permission to amend his preliminary statement on account of material errors therein inserted through inadvertence or mistake, and presents herewith a complete corrected preliminary statement in that behalf, and the affidavit of X. T. in which are set forth the reasons for the offered amendment; the reasons upon which permission to amend is prayed are as follows: [*Here set forth the reasons.*]

The examiner is also hereby moved to stay all proceedings in this interference until said motion can be determined.

R. S.,

Attorney for A. B.

[Acknowledgment of service, or other proof thereof.]

(1) See P. O. Rules 113 and 153. Notice of hearing thereon should be given in the usual way.

2173a.

Amended Preliminary Statement of G. H. G.(1)

[*Caption and venue.*]

State of Pennsylvania, }
County of Allegheny. } ss.

G. H. G., of 1200 Macon Street, Swissvale, in the county of Allegheny and state of Pennsylvania, being duly sworn, deposes and says that he, jointly with L. C., is a party to the above-entitled interference, and he further deposes and says, as follows:

(a) That the subject-matter of the issue was conceived by them between April 28, 1915, and July 22, 1915;

(b) That the first drawing illustrating the subject-matter of the issue was made between July 22d and August 10, 1915, and that the first written description thereof was made on or about September 24, 1915;

(c) That the invention was disclosed to others between July 22d and August 10, 1915;

(d) That the invention was reduced to practice between December 23, 1915, and March 19, 1916;

(e) That the invention has not gone into extensive commercial use;

(f) That no application covering the same invention was filed in any country foreign to the United States within twelve months prior to May 3, 1916.

G. H. G.

Sworn to and subscribed before me this 31st day of May, 1918.

B. B. H.,

Notary Public.

(1) This being a joint invention the other inventor also makes an amended preliminary statement identical with this one.

No. 2174.

Motion to Dissolve Interference.(1)

(Entitle in the United States Patent Office, before the Examiner of Interferences, and give Style and Interference Number.)

A. B., party to the above entitled interference, by his attorney, M. K., moves to dissolve the said interference upon the following grounds:

(a) There has been such informality in declaring the interference that it will preclude the proper determination of the question of priority of invention, and in support hereof it will be shown that [*here state the informality in detail*].

(b) The counts [*mention the numbers*] do not embody subject matter having patentable novelty, for the following reasons: [*Here set forth the reasons in detail.*]

(c) The party [*name him*] has no right to make the claims comprehended by counts [*mention the numbers*], for the reasons that [*here set forth the reasons in detail*].

M. K.,

Attorney for A. B.

(1) See P. O. Rules 122, 153 and 154, dealing with this motion and proof of the service thereof.

No. 2175.

Appeal to the Examiners-in-Chief from the Examiner of Interference.(1)

IN THE UNITED STATES PATENT OFFICE.

Thomas S. Waller

vs.

Charles T. Coe

vs.

Gideon P. Brown.

} Interference No. 33,832.

Hon. Commissioner of Patents.

Sir: Now comes Charles T. Coe by his attorneys and appeals to the Examiners-in-Chief from the decision of the Examiners of Interferences in the above entitled cause awarding priority of invention to Gideon P. Brown for the following reasons:

1. The Examiner of Interferences erred in awarding priority of invention of the subject matter of the interference to Gideon P. Brown.

2. The Examiner of Interferences erred in not awarding priority of invention of the subject matter of this interference to the appellant Charles T. Coe.

3. The Examiner of Interferences erred in holding that the form of device shown by the appellant in Figs. 1 to 3 of his application Serial No. 631,105, has no means for causing the nozzles to move in paths specified in each count of the issues of this interference.

4. The Examiner of Interferences erred in holding that the party Brown has a right to make the claims corresponding to the counts in the issue in this interference.

5. The Examiner of Interferences erred in holding that this appellant Coe has no right to make the claims corresponding to count 3 of this issue.

6. The Examiner of Interferences erred in holding that the Coe structure and installation at the Worthington Pump Works as illustrated, for example, in Exhibits 0-1, 0-2, 0-3, 0-4, 0-5 and 0-6, did not embody means for causing the nozzles to follow the direction of the tubes as called for by the counts in this interference.

7. The Examiner of Interferences erred in holding that the structure constituting the Worthington plant installation as disclosed in Exhibits 0-1, 0-2, 0-3, 0-4, 0-5 and 0-6 did not include means for moving the nozzles toward and away from the boiler as called in count 3 of the issue.

8. The Examiner of Interferences erred in holding that the blower installed and operated at the Worthington Pump Works as illustrated in Exhibits 0-1, 0-2, 0-3, 0-4, 0-5, and 0-6 was not an embodiment of the structure called for by the counts of this interference.

Respectfully submitted,

CHARLES T. COE,

By A. N.,

Attorney for Coe.

(1) From the record in *Coe v. Brown*, 44 App. D. C. 455.

No. 2176.

Assignment of Errors on Appeal.(1)

IN THE UNITED STATES PATENT OFFICE.

Thomas S. Waller

vs.

Charles T. Coe,

vs.

Gideon P. Brown.

} Interference No. 33,832.

Hon. Commissioner of Patents.

Sir: Now comes Charles T. Coe, one of the parties in the above entitled interference and appeals from the decision of

the Examiner-in-Chief herein to the Commissioner in person from the decision awarding priority of invention to the party Brown and the party Coe bases his appeal on the following reasons:

1. The Examiners-in-Chief erred in holding that Coe's construction built and tested in 1909, and 1910, and the construction shown in Figs. 1, 2 and 3 of the Coe application in interference, do not answer to the counts.

2. The Examiners-in-Chief erred in failing to hold that the counts as drawn are not satisfied by the constructions produced by Coe in 1909 and early in 1910, and disclosed by Figs. 1, 2 and 3 of the Coe application.

3. The Examiners-in-Chief erred in failing to hold that Coe had a complete reduction to practice of a structure embodying the counts in this interference prior to the party Brown's filing date.

4. The Examiners-in-Chief erred in failing to award priority of invention to the party Coe.

5. The Examiners-in-Chief erred in awarding priority of invention to the party Brown herein.

6. The Examiners-in-Chief erred in failing on their own motion to entertain the question of the right of the party Brown to make the claims.

7. The Examiners-in-Chief erred in failing to hold that Brown had no right to make claims corresponding to the counts.

Wherefore the party Coe brings this his appeal and respectfully urges that upon consideration thereof, the decision of the Examiners-in-Chief be set aside and submits that priority of invention should be properly awarded to him.

Respectfully submitted,

A. N.,
Attorney for Coe.

No. 2177.**Petition for Rehearing.(1)**

IN THE UNITED STATES PATENT OFFICE.

| | | |
|------------------|---|--------------------------|
| Charles T. Coe | } | Interference No. 33,832. |
| vs. | | |
| Gideon P. Brown. | | |

Hon. Commissioner of Patents.

Sir: And now comes the party Charles T. Coe, and respectfully petitions and prays that your Honor grant him a rehearing on the merits of the above entitled cause.

The following represent the reasons which we respectfully advance for requesting a rehearing.

REASONS.

In the interfering structures, there are manifestly clearly illustrated and described devices for accomplishing the same purposes, namely that of the removal of accumulations from the surfaces of the inclined water tube boilers of the so-called Babcock and Wilcox types. In both cases, the means employed are generally the same, namely a header or stand-pipe having projecting therefrom a series of nozzles, the discharge end of the nozzles being positioned on a plane between adjacent sets of water tubes. Both cases show the means for moving the nozzles inward and outward and in both instances a handle is employed, *f'* of Brown, and 97 of Coe, for turning the header or standpipe for the purpose of changing the direction of discharge of the nozzle between the different layers of water tubes.

Both parties appreciate the necessity of having the nozzles move parallel with the tubes during their swinging action, and both parties accomplish this means by associating the blower with an inclined part or surface. In the Brown construction your Honor will observe, by reference to Figures 1 and 3, this inclined guide or surface is represented by a mem-

ber *f*6, shown in plan view in Figure 3. This member is mounted on the surface wall and is a member independent of the blower itself. It is in the form of a metal box having the inclined grooves, which are clearly shown in Fig. 2. From the lower end of the pipe or header, there is projected laterally pins *f*2, one being directed as your Honor will observe towards the furnace and engages the inclined wall *f*3, so that upon the turning of the header or pipe *e*, the pin will engage the guide and thereby move the blower up or down, according to the direction of rotation. In the Coe structure, especially as represented in Fig. 5, by moving the handle 97, the pipe 96 can be raised or lowered, according to the inclination of the guides 105 and 106, which would swing the nozzles parallel with the water tubes. Now in the reduction to practice proven to have been made by Mr. Coe the latter part of 1909, applied to the Babcock and Wilcox boilers at the Worthington Pump Company's works at Harrison, N. J., substantially the same thought was expressed, with the variation only that instead of having outside guides 105 and 106, or one similar to the guide *f*4, the inclined tubes 71 of Fig. 5 of the Coe drawings were employed. Your Honor should bear in mind that it was but the first line of tubes used in lieu of the guides 105-106, which were employed in this early construction. In a water tube boiler of the Babcock and Wilcox type, there would probably be from seventy-five to one hundred tubes in a layer or set, and it was only the first tube of the set that was employed by Mr. Coe for his guiding purposes in the earlier reduction to practice.

The claims of the interference simply recite that the "blower" was "for water tube boilers having inclined tubes" and that certainly was exactly what Coe produced in his first reduction to practice. Then in addition the claims required that some "means" must be present in the structure for "causing said nozzles to follow the direction of the tubes." The means employed by Brown were exterior. The means shown in the modified form of Coe are shown *exterior* of the furnace,

while the first reduction to practice of Coe was *interior* of the furnace and was represented by the first or foremost water tubes. These foremost tubes certainly represent "means for causing the nozzles to follow the direction of the tubes" and the evidence shows that the device was certainly effective and is in us today.

In *Kenny Mfg. Co. v. J. L. Mott Iron Works*, F. R. 137, page 431, it was held:

"If the claim shows a combination of parts forming a workable device when attached to a structure for which it is evidently intended, it is enough."

It is thought therefore that a fair construction of the claims should justify the inclusion of the earlier Coe reduction to practice. It is, as has been repeatedly held, the practice to give a claim the broadest possible construction compatible with the invention that has been made. See *Miel v. Young*, 1907 C. D. 561, Court of Appeals. Seemingly if the prior art had disclosed the utilization of the first line of tubes for the guides there would be some question possibly as to the patentability of a structure which utilized an exterior guide in lieu of said tube. The invention is broadly new and the "all including term means" should very properly, we submit, include not only an external, but an internal guide.

These matters can be exemplified by physical exhibits, if your Honor will grant this petition. Again, if there is any means other than the guide above referred to for effecting the adjustment, it is the handle, and that handle is found in both cases. This was suggested at the hearing by your Honor, who illustrated the act with a pencil held between the fingers.

In view of the above, it is earnestly asked that a rehearing be accorded the party Coe.

July 21, 1915.

Respectfully,

B. & M.,
For Coe.

No. 2178.**Notice of Appeal from Decision of Commissioner.(1)**

Interference No. 33,832, Paper No. 128.

IN THE UNITED STATES PATENT OFFICE.

Charles T. Coe }
vs. } Interference No. 33,832.
G. P. Brown }

Hon. Commissioner of Patents.

Sir: And now comes Charles T. Coe, by B. & M., his attorneys, and gives notice to the Commissioner of Patents of his appeal from a decision of the Commissioner of Patents rendered on or about the 29th day of June, 1915, awarding priority of invention to G. P. Brown, in the above entitled cause, and assigns as his reasons for the appeal the following:

1. The Commissioner of Patents erred in awarding priority to the contestant Brown in view of the proven prior reduction to practice of the party Coe.

2. The Commissioner of Patents erred in narrowly construing the issues.

3. The invention is broadly new and the construction proven to have been made by Coe and reduced to practice by him at the Worthington Pump Company's works at Harrison, N. J., the latter part of 1909, represents an embodiment of the invention of all of the issues and the Commissioner of Patents erred in not according Coe the benefit of this date as a reduction to practice of the invention of the issues.

4. The Commissioner of Patents erred in not holding and deciding that the outermost tubes of the boiler were not the "means for causing said nozzles to follow the direction of the tubes" (the remaining tubes).

5. The Commissioner of Patents erred in holding and deciding that there was no such device disclosed in the Coe reduction as would correspond to means for causing the nozzles to follow the direction of the tubes when power is applied.

6. The Commissioner of Patents erred in construing the claims as not to be readable on the construction wherein the "all inclusive means" would include a handle for operating the nozzle, a handle plus any guide, and any means for moving the nozzles plus a guide, irrespective of the location of the guide.

7. The Commissioner of Patents erred in failing to follow the practice as announced by this court in the case of Kirby v. Clements, decided May 28, 1915; Miel v. Young, 29 App. D. C. 481; Lindmark v. Hodgkins, 31 App. D. C. 612, and in view of the practice established by the court it was the Commissioner's duty to "give to claims the broadest interpretation which they will reasonably support."

8. The Commissioner of Patents erred in not awarding priority to Coe in view of the facts of record.

Very respectfully,

CHARLES T. COE,

By B. & M.,

Associate Attorneys.

(1) From the record in Brown v. Coe, 44 App. D. C. 455.

No. 2179.

Affidavit of Applicant Carrying Date of Invention Back of Reference.(1)

IN THE UNITED STATES PATENT OFFICE.

| | |
|-------------------------------------|------------------------------------|
| In the matter of the application of | } Before the Examiner. No. 232. |
| A. B. C. for a patent for an im- | |
| provement in columns for build- | |
| ing construction, filed December | |
| 5, 1905, Serial No. 290,427. | |

| | |
|------------------------------|-------|
| State of New York, | } ss. |
| City and County of New York. | |

A. B. C., being duly sworn, deposes and says:

I am the applicant named herein.

In this application I have made two claims, as follows:

1. A column comprising a hollow casing, a cap seated on the same, the cap and casing being of substantially identical external contour and a filling within the casing adapting the column to resist crushing strains.

2. A column comprising a hollow casing, a hollow cap seated thereon and extending above the same and having a reduced neck extending into the casing, the cap and casing being of substantially identical external contour and the filling in said casing and cap adapting the column to resist crushing strains.

That the invention set forth in the foregoing claims was completed by me prior to October 23, 1905.

That prior to October 23, 1905, I disclosed by means of sketches and oral description the said invention to others, including J. J. T., of New York, who, at the time of such disclosures, namely, prior to October 23, 1905, was a draftsman in the employ of The New York Fireproof Column Company, of which I am president.

That prior to October 23, 1905, the aforesaid J. J. T. made for me, or rather for the company aforesaid, under my direction and in accordance with my instructions and the information given him, drawings of the columns invented by me and embodying the subject matter of the claims hereinbefore quoted, and that the photographic copy attached hereto and marked "Exhibit A" is a true photographic copy of a drawing which was made, prior to October 23, 1905, by the said J. J. T., for me or the aforesaid New York Fireproof Company from information furnished by me.

That prior to October 23, 1905, the invention embraced in the aforesaid claims was also disclosed to other person or persons, to-wit, C. C. W., who also was an employe of The New York Fireproof Column Company, and that said disclosure was made by means of drawings and oral description.

That the photographic copy of the drawing attached hereto marked "Exhibit A" and made as aforesaid prior to October 23, 1900, correctly represents the column which I had in-

vented and disclosed to Tresidder and Warren prior to October 23, 1905, as aforesaid.

I further say that I do not know and do not believe that the invention which is the subject matter of the claims of my application above referred to has been in public use or on sale in this country or patented or described in any printed publication in this or any foreign country for more than two years prior to my said application, and that I have never abandoned the invention.

A. B. C

Sworn to before me at the city of New York, county of New York and state of New York, this 19th day of July, 1906.

T. M.,

[*Notarial seal.*]

Notary Public, New York County.

(1) P. O. Rule 75.

No. 2180.

Supporting Affidavit (See No. 2179).

State of New York,
City and County of New York. } ss.

C. C. W., of Brooklyn, Kings county, New York, being duly sworn, deposes and says, as follows:

Prior to October 23, 1905, I was an employe of The New York Fireproof Column Company, of New York city, New York;

I am well acquainted with A. B. C., the president of the company aforesaid, and I am also acquainted with J. J. T., of New York city, and aver that the said J. J. T., at the time prior to October 23, 1905, was a draftsman in the employ of The New York Fireproof Company aforesaid.

Prior to October 23, 1905, said A. B. C. disclosed to me by means of drawings and oral description, a certain improvement which he had invented in fireproof columns and which embraced a hollow casing provided with a cap which was seated in the casing, and in which the cap and casing were of

identical external contour and the casing contained a filling adapting the column to resist crushing strains. In the structure aforesaid, disclosed to me prior to October 23, 1905, the cap referred to was hollow and extended above the casing and was provided with a reduced neck which extended into the casing, and the filling extended up into the cap as well as being in the casing.

I am also aware of the fact that the aforesaid construction of column was disclosed to J. J. T., aforesaid, prior to October 23, 1905, and that the said J. J. T., as a draftsman in the employ of the said company, made drawings thereof for the said company, in accordance with the disclosures to him made by the said A. B. C. and under the direction of the said A. B. C.

I further state that the photographic copy of the drawing attached to the affidavit of A. B. C., accompanying this affidavit of mine, marked "Exhibit A," correctly represents the invention which was disclosed to me by the said A. B. C. prior to October 23, 1905, as aforesaid.

C. C. W.

Sworn to before me this 19th day of July, 1906, in the city, county and state of New York.

M. N.,

Notary Public, New York County.

[*Notarial seal.*]

No. 2181.

Form of Notice of Appeal to the Court of Appeals of the District of Columbia in an Ex Parte Case, with Reasons of Appeal and Request for Transcript.(1)

In the United States Patent Office.

| | | |
|----------------------|---|--------------------|
| In re Application of | } | Serial No. —. |
| —. | | Filed —. |
| | | Improvements in —. |

To the Commissioner of Patents:

Sir: You are hereby notified of my appeal to the Court of Appeals of the District of Columbia from your decision,

rendered on or about the — day of —, 19—, rejecting my above entitled application and refusing me a patent for the invention set forth therein.

The following are assigned as reasons of appeal:

[Here insert in separate counts the specific errors complained of.]

By —, his Attorney.

(1) Rev. Stat., Sec. 4911; Sec. 9, Act of Feb. 9, 1893; 27 Stat. L. 434.

From the adverse decision of the commissioner upon the claims of an application and in interference cases, an appeal may be taken to the Court of Appeals of the District of Columbia in the manner prescribed by the rules of that court.

When an appeal is taken to the Court of Appeals of the District of Columbia, the appellant will give notice thereof to the commissioner, and file in the Patent Office, within forty days, exclusive of Sundays and holidays, from the date of the decision appealed from, his reasons of appeal specifically set forth in writing. Sec. 228 of Code of 1901 of District of Columbia, 31 Stat. L. 1226, adopting the Act of February 9, 1893, 27 Stat. L. 434.

See Rules 21 and 22 of the Court of Appeals of the District of Columbia.

No. 2182.

Form of Petition for an Appeal to the Court of Appeals of the District of Columbia in an Ex Parte Case.(1)

In the Court of Appeals of the
District of Columbia.

| | | |
|----------------------|---|--------------------|
| In re Application of | } | Serial No. —. |
| —. | | Filed —. |
| | | Improvements in —. |

To the Court of Appeals of the District of Columbia:

Your petitioner, —, of —, in the county of —, and state of —, respectfully represents:

That he is the original and first inventor of certain new and useful improvements in —.

That on the — day of —, 19—, in the manner prescribed by law, he presented his application to the patent office, praying that a patent be issued to him for the said invention.

That such proceedings were had in said office upon said application; that on the — day of —, 19—, it was rejected by the commissioner of patents and a patent for said invention was refused him.

That on the — day of —, 19—, your petitioner, pursuant to sections 4912 and 4913, Rev. Stat., United States, gave notice to the commissioner of patents of his appeal to this honorable court from his refusal to issue a patent to him for said invention upon said application as aforesaid, and filed with him, in writing, the following reasons of appeal:

[Here recite reasons of appeal assigned in the notice to the commissioner.]

That the commissioner of patents has furnished him a certified transcript of the record and proceedings relating to said application for patent, which transcript is filed herewith and is to be deemed and taken as a part hereof.

Wherefore your petitioner prays that his said appeal may be heard upon and for the reasons assigned therefor to the commissioner as aforesaid, and that said appeal may be determined and the decision of the commissioner be revised and reversed, that justice may be done in the premises. —,

By —, His Attorney.

[To be signed here by a member of the bar of the Court of Appeals of District of Columbia,]

—.

Solicitor and of Counsel.

(1) See note to No. 2181.

No. 2183.**Form of Notice of Appeal to the Court of Appeals of the District of Columbia in an Interference Case, with Reasons of Appeal and Request for Transcript.(1)**

In the United States Patent Office.

Before the Commissioner of Patents.

— }
 vs. } Interference No. —.
 — } Subject matter: Improvement in —.

And now comes —, by —, his attorney, and gives notice to the commissioner of patents of his appeal to the Court of Appeals of the District of Columbia from the decision of the said commissioner, rendered on or about the — day of —, 19—, awarding priority of invention to — in the above entitled case, and assigns as his reasons of appeal the following:

[Here set out in separate counts the specific errors in the commissioner's decision complained of.]

By —, his Attorney.

(1) See note to No. 2181.

No. 2184.**Form of Petition for an Appeal to the Court of Appeals of the District of Columbia in an Interference Case.(1)**

In the Court of Appeals of the District of Columbia.

—, Appellant, }
 vs. } In re Interference No. —.
 —.

To the Court of Appeals of the District of Columbia:

Your petitioner, —, of —, in the county of — and state of —, respectfully represents:

That he is the original and first inventor of certain new and useful improvements in —.

That on the — day of —, in the manner prescribed by law, he presented his application to the patent office, praying that a patent be issued to him for the said invention.

That thereafter, to-wit, on the — day of —, 19—, an interference proceeding was instituted and declared between his said application and a pending application of one —, serial No —, filed —, for a similar invention.

That the subject matter of said interference as set forth in the official declaration was as follows:

[Here state the issues of the interference.]

That thereafter, to-wit, on the — day of —, 19—, the case having been submitted upon the preliminary statements and evidence presented by the parties thereto, the examiner of interferences rendered a decision awarding priority of invention to —.

That, pursuant to the statutes and the rules of practice in the patent office in such case made and provided, — appealed from the said adverse decision of the examiner of interferences to the board of examiners-in-chief, and the case having been argued and submitted to said board, a decision was rendered by said board on the — day of —, affirming [*or reversing*] the decision of the examiner of interferences.

That thereafter, pursuant to said statutes and rules, — appealed from the said adverse decision of the board of examiners-in-chief to the commissioner of patents, and the same coming on to be heard and having been argued and submitted, a decision was, on the — day of —, 19—, rendered by the commissioner adverse to your petitioner, affirming [*or reversing*] the decision of the board of examiners-in-chief and awarding priority of invention to the said —.

That on the — day of —, 19—, your petitioner, pursuant to sections 4912 and 4913, Revised Statutes, United States, gave notice to the commissioner of patents of his appeal to this honorable court from his decision awarding priority of invention to said —, as aforesaid, and filed with him, in writing, the following reasons of appeal:

[Here insert reasons of appeal assigned in notice to commissioner.]

That the commissioner of patents has furnished your petitioner a certified transcript of the record and proceedings relating to said interference case, which transcript is filed herewith and is to be deemed and taken as a part hereof.

Wherefore your petitioner prays that his said appeal may be heard upon and for the reasons assigned therefor to the commissioner, as aforesaid, and that said appeal may be determined and the decision of the commissioner be revised and reversed, that justice may be done in the premises.

_____,
By _____, his Attorney.

[To be signed here by a member of the bar of the Court of Appeals of District of Columbia.]

_____,
Solicitor and of Counsel.

(1) See note to No. 2181.

TRADE MARKS

The following forms illustrate the manner of preparing papers for applications for registration of trade marks.

No. 2185.**Petition.**

To the Commissioner of Patents:

The undersigned presents herewith a drawing and five specimens [*or facsimiles*] of his trade mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the (*act of February 20, 1905, as amended*) or (*act of March 19, 1920, sec. 1*). (1)

[Signature of applicant.]

[Date of execution.]

(1) Indicate which act desired; the latter provides for marks used in international trade and marks not registrable under the former act.

No. 2186.**Petition with Power of Attorney.**

(Under the act of February 20, 1905.) (1)

To the Commissioner of Patents:

The undersigned presents herewith a drawing and five specimens [*or facsimiles*] of his trade mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the law in such cases made and provided, and hereby appoints —, of —, state of —, his attorney, to

prosecute this application for registration, with full power of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith.

(Signed) ____.

(1) This is the general act.

No. 2187.

Petition with Power of Attorney.

(Under the act of March 19, 1920.) (1)

To the Commissioner of Patents:

The undersigned presents herewith a drawing and five specimens [*or facsimiles*] of his trade mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the provisions of the act of March 19, 1920, and hereby appoints ____, of ____, state of ____, his attorney, to prosecute this application for registration, with full power of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith.

(Signed) ____.

(Cancel one of these clauses.)

(1) This act permits registration of some marks in international trade and some otherwise unregistrable, under conditions mentioned in the act.

No. 2188.

Power of Attorney.

To the Commissioner of Patents:

The undersigned hereby appoints ____, of ____, state of ____, his attorney, to prosecute this application for registra-

tion, with full power of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith. (Signed) _____.

No. 2189.

Statement for an Individual.

To all whom it may concern:

Be it known that I [name of applicant], a citizen of [citizenship of applicant], residing at [applicant's address], and doing business at [business address], have adopted and used the trade mark shown in the accompanying drawing(1) for [particular description of goods], in class No. [number and title of class—see classification].

The trade mark has been continuously used in my business(2) [name of predecessor, if any] since [earliest date of use].

The trade mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade mark is shown [or state other mode or modes of application].

[Signature of applicant.]

[First name must be given in full.]

(1) See Rule 22b.

(2) If applicant has had no predecessors, omit this clause.

No. 2190.

Declaration for an Individual.

State of _____, }
County of _____. } ss.

_____ [name of applicant], being duly sworn, deposes and says that he is the applicant named in the foregoing statement; and that he believes the foregoing statement is true; that he believes himself to be the owner of the trade mark sought to

be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by him in commerce among the several states of the United States (and between the United States and foreign nations or Indian tribes, and particularly with [names of foreign countries or Indian tribes]); that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens [*or facsimiles*] show the trade mark as actually used upon the goods.

[Signature of applicant.]

Subscribed and sworn to before me, a [official title], this
[date of execution].

RICHARD JONES.

[L. S.]

[Official title.]

No. 2191.

**Declaration for Individual Under Section 1 of the Act
Approved March 19, 1920.(1)**

State of Connecticut, }
County of Fairfield. } ss.

Richard Roe, being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said mark in the United States of America, on merchandise of the same descriptive properties as those recited in the foregoing statement; that said mark is used by him in commerce among the several states of the United States (and between the United States and foreign nations, or Indian tribes, and particularly with Russia and Turkey); that the description and drawing presented truly represent the mark sought to be registered; that

the specimens show the mark as actually used upon the goods; and that the mark has been in bona fide use for not less than one year in interstate or (and) foreign commerce (or in commerce with the Indian tribes) by the applicant or his predecessors in business.

RICHARD ROE.

Subscribed and sworn to before me, a notary public, this 15th day of May, 1920.

JOHN SMITH.

Notary Public.

(1) See note under Form No. 2187.

No. 2192.

Statement for a Firm.

To all whom it may concern:

Be it known that we, [firm name], a firm domiciled in [domicile], doing business at [business address], and composed of the following members [name of members of the firm], citizens of [citizenship of members of the firm], have adopted and used the trade mark shown in the accompanying drawings(2) for [particular description of goods], in class No. [number and title of class. See classification.](3)

The trade mark has been continuously used in our business (and in the business of [name of predecessors, if any]),(4) since [earliest date of use].

The trade mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade mark is shown [or state other mode or modes of application].

[Firm name.]

By [signature of member of the firm].

A Member of the Firm.

(2) See Rule 22b.

(3) See the classification in Form No. 2205, below.

(4) If applicant has had no predecessors, omit this clause.

No. 2193.**Declaration for a Firm.**

State of New York, }
 County of New York. } ss.

I [name of affiant], being duly sworn, deposes and says that he is a member of the firm, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said firm is the owner of the trade mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said firm in commerce among the several states of the United States (and between the United States and foreign nations or Indian tribes, and particularly with [name of foreign countries or Indian tribes]) (1); that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens [or facsimiles] show the trade mark as actually used upon the goods.

[Signature of affiant.]

Subscribed and sworn to before me, a [official title], this [date of execution].

[L. S.]

HARRY BROWN,

[Official title.]

(1) Omit if not the fact.

No. 2194.**Statement for a Corporation or Association.**

To all whom it may concern:

Be it known that [name of applicant], a corporation(a), duly organized under the laws of [state or country under the laws of which organized], and located in [location of corporation], and doing business at [business address], has adopted and

used the trade mark shown in the accompanying drawing,(1) for [particular description of goods], in Class No. [number and title of class. See classification.]

The trade mark has been continuously used in the business of said corporation(2) (and in the business of its predecessors, [name of predecessors, if any]) since [give earliest date of use].

The trade mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade mark is shown [or state other mode or modes of application].

[Name of applicant.]

By [signature of officer].

[Official title.]

(a) If applicant be an association, then use the word "association" here.

(1) See Rule 22b.

(2) If applicant has had no predecessors, omit this clause.

No. 2195.

Declaration for a Corporation or Association.

State of Massachusetts, }
County of Suffolk. } ss.

I [name of affiant], being duly sworn, deposes and says that he is the [official title] of the corporation, the applicant named in the foregoing statement; that he believes the foregoing is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several states of the United States (and between the United States and foreign nations or Indian tribes and particularly with [names of foreign nations or Indian tribes])(1); that the description and drawing presented truly represent the trade

mark sought to be registered; and that the specimens [*or* facsimiles] show the trade mark as actually used upon the goods. [Signature of affiant.]

Subscribed and sworn to before me, a [official title], this [date of execution].

[L. S.]

WILLIAM GRANE,

[Official title.]

(1) Omit if not the fact.

No. 2196.

Declaration for Applicants Under the 10-Year Proviso, Act of February 20, 1905.

State of Connecticut, }
County of Fairfield. } ss.

— [name of applicant], being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes himself to be the owner of the mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by him in commerce among the several states of the United States (and between the United States and foreign nations, or Indian tribes, and particularly with [names of foreign nations or Indian tribes]); (1) that the description and drawing presented truly represent the mark sought to be registered; that the specimens [*or* facsimiles] show the mark as actually used upon the goods; and that the mark has been in actual use as a trade mark of the applicant (and applicant's predecessors from whom title was derived) for ten years next preceding February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

[Signature of affiant.]

Subscribed and sworn to before me, a [official title], this [date of execution].

[L. S.]

CHARLES MASON,

[Official title.]

(1) Omit if not the fact.

No. 2197.**Declaration for Applicants Under Section 9 of the Act
Approved March 19, 1920.(1)**

State of Connecticut, }
County of Fairfield. } ss.

Richard Roe, being duly sworn, deposes and says that he is the applicant in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use the said trade mark in the United States of America on merchandise of the same descriptive properties as those recited in the foregoing statement; that said mark is used by him in commerce among the several states of the United States (and between the United States and foreign nations, or Indian tribes, and particularly with Russia and Turkey); that the description and drawing presented truly represent the mark sought to be registered; that the specimens show the mark as actually used upon the goods; that the applicant is the proprietor of registration No. — of —, effected on the ground of actual and exclusive use by the applicant of the mark shown therein on the goods recited in said registration as a trade mark for ten years next preceding February 20, 1905; and that the mark has been used by the applicant (or his predecessors in business) on the articles named in the foregoing statement in interstate (foreign) commerce (commerce with the Indian tribes) for at least one year.

RICHARD ROE.

Subscribed and sworn to before me, a notary public, this 15th day of May, 1920.
[L. S.]

HAROLD BROWN,
Notary Public.

(1) Permitting registration as applied later to other articles of a mark already registered under the ten-year clause of Sec. 5 of the Act of February 20, 1905.

No. 2198.**Declaration for Foreigner.(1)**

United States Consulate, } ss.
 London, England. }

— [name of affiant], being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes himself to be the owner of the trade mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; (that said trade mark has been registered in [name of country], on [date], No. [number of registration]); (2) that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens [*or* facsimiles] show the trade mark as actually used upon the goods. [Signature of affiant.]

Subscribed and sworn to before me, a [official title], this [date of execution]. RICHARD JONES,
 [Seal.] [Official title.]

(1) Modify accordingly if a firm, corporation or association.

(2) If filing but not registration has taken place, so state, with date.

No. 2199.**Statement for an Individual Under Section 3 of the Act of May 4, 1906.**

To all whom it may concern:

Be it known that I, [name of applicant], a [citizenship of applicant], residing at [applicant's residence], and doing business at [business address], and having a manufacturing establishment at Hartford, state of Connecticut, have adopted and used the trade mark shown in the accompanying drawing for the following products of such manufacturing establishment, namely [particular description of goods], in Class No. [number and title of class. See classification.]

The trade mark has been continuously used in my business (and in the business of my predecessor [name of predecessor, if any]) since [earliest date of use].

The trade mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade mark is shown [*or* state other mode or modes of application]. [Signature of applicant.]

No. 2200.

Declaration for Foreigners Under Section 3 of the Act of May 4, 1906.

United States Consulate, } ss.
London, England.

— [name of affiant], being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trade mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by him in commerce among the several states of the United States (and between the United States and foreign nations or Indian tribes, and particularly with [names of foreign countries or Indian tribes]); (1) that the description and drawing presented truly represent the trade mark sought to be registered; that the specimens [*or* facsimiles] show the trade mark as actually used upon the goods; that his manufacturing establishment is located at [location of manufacturing establishment]; and that the goods for which the trade mark is claimed in this application are the products of such establishment.

[Signature of affiant.]

Subscribed and sworn to before me, a United States consul, this [date of execution].

RICHARD JONES,

(1) Omit if not the fact.

[Official title.]

No. 2201.**Notice of Opposition.**

To the Commissioner of Patents:

In the matter of an application for the registration of a trade mark for [particular goods], Serial No. [number], filed [date of application], by [name of applicant], of [location or residence of applicant], which was published on [page, volume, number], of the Official Gazette of [date of Official Gazette], I [name of party opposing], (1) residing at [residence or location of party opposing], believe I would be damaged by such registration, and I hereby give notice of my intention to oppose the registration of said trade mark.

The grounds for opposition are as follows: [Here state the grounds for opposing registration.]

[Signature of opposing party.]

State of Illinois, }
County of Cook. } ss

—, being duly sworn [*or affirmed*], deposes and says that he is the party of that name mentioned in the foregoing notice of opposition, that he has read and signed the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. —.

Subscribed and sworn to [*or affirmed*] before me this 23d day of June, 1906.

CHARLES KINGMAN,

[L. S.]

[Official title.]

(1) Modify if a firm, association or corporation is the opposing party.

No. 2202.**Application for Cancellation of Trade Mark.**

To the Commissioner of Patents:

In the matter of trade mark [number of registration], registered [date of registration], by [name of registrant], of [residence or location of registrant], I, (1) [name of party applying

for cancellation], residing at [residence or location of the party applying for cancellation], deem myself injured by said registration, and I hereby apply for the cancellation thereof.

The grounds for cancellation are as follows: [Here state the grounds for cancellation.]

[Signature of party applying for cancellation.]

State of Maryland, }
City of Baltimore. } ss.

—, being duly sworn [*or* affirmed], deposes and says that he is the party of that name mentioned in the foregoing application for cancellation, that he has read and signed the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

Subscribed and sworn to [*or* affirmed] before me this 26th day of June, 1906.

JOHN JONES,

[L. S.]

[Official title.]

(1) Modify if a firm, association or corporation is the applicant.

No. 2203.

Petition for Renewal.

To the Commissioner of Patents:

John Doe herewith submits the original certificate of registration No. —, granted to — on —, and requests that the same be renewed in accordance with the provisions of section 12 of the trade mark act of February 20, 1905.

The said John Doe further represents that he is the registrant(1) named in said certificate No. —; that he believes himself to be the owner of the mark set forth therein; and that he has not abandoned the use of said mark.

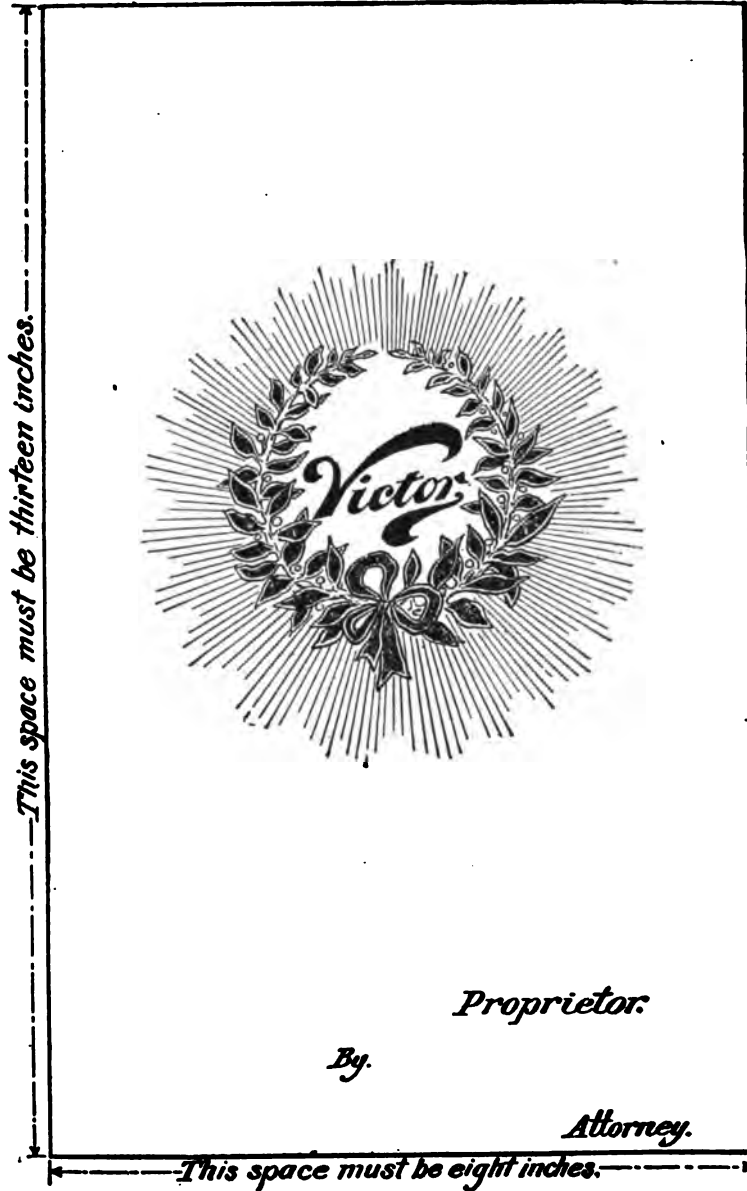
[Signature of applicant.]

(1) If petitioner is the transferee of record in the Patent Office, the clause "transferee of record in the Patent Office of the registrant" should be substituted for "registrant"; if the legal representative, the clause, "legal representative of the registrant" should be substituted for "registrant."

No. 2204.

Trade Mark Drawing.

*The size of the sheet must be
exactly 10x15 inches. See rule 36 (2).*



No. 2205.**Classification of Merchandise.(1)**

1. Raw or partly prepared materials.
2. Receptacles.
3. Baggage, horse equipments, portfolios, and pocketbooks.
4. Abrasive, detergent, and polishing materials.
5. Adhesives.
6. Chemicals, medicines, and pharmaceutical preparations.
7. Cordage.
8. Smokers' articles, not including tobacco products.
9. Explosives, firearms, equipments, and projectiles.
10. Fertilizers.
11. Inks and inking materials.
12. Construction materials.
13. Hardware and plumbing and steam-fitting supplies.
14. Metals and metal castings and forgings.
15. Oils and greases.
16. Paints and painters' materials.
17. Tobacco products.
19. Vehicles, not including engines.
20. Linoleum and oiled cloth.
21. Electrical apparatus, machines, and supplies.
22. Games, toys, and sporting goods.
23. Cutlery, machinery, and tools, and parts thereof.
24. Laundry appliances and machines.
25. Locks and safes.
26. Measuring and scientific appliances.
27. Horological instruments.
28. Jewelry and precious-metal ware.
29. Brooms, brushes, and dusters.
30. Crockery, earthenware, and porcelain.
31. Filters and refrigerators.
32. Furniture and upholstery.
33. Glassware.

34. Heating, lighting, and ventilating apparatus, not including electrical apparatus.
35. Belting, hose, machinery packing, and nonmetallic tires.
36. Musical instruments and supplies.
37. Paper and stationery.
38. Prints and publications.
39. Clothing.
40. Fancy goods, furnishings, and notions.
41. Canes, parasols, and umbrellas.
42. Knitted, netted, and textile fabrics.
43. Thread and yarn.
44. Dental, medical, and surgical appliances.
45. Beverages, nonalcoholic.
46. Foods and ingredients of foods.
47. Wines.
48. Malt extracts and liquors.
49. Distilled alcoholic liquors.
50. Merchandise not otherwise classified.

NOTE.—Class 18 was abolished February 24, 1909.

(1) Provided for by Act of May 4, 1906, 34 Stat. L. 169.

The present Trade Mark Statutes are the Act of February 20, 1905, 33 Stat. L. 724, amended by the Act of May 4, 1906, 34 Stat. L. 169; Act of March 2, 1907, 34 Stat. L. 1251; Act of February 18, 1911, 36 Stat. L. 918; Act of January 8, 1913, 37 Stat. L. 649; Act of March 19, 1920, 66 Cong. 2 Sess., providing especially for registration of marks used in international trade, and marks used for a limited time in interstate or foreign trade but not registrable under existing law.

PRINTS.**Application for Registration.**

No. 2206.**For an Individual.**

To the Commissioner of Patents:

The undersigned —, (1) a —, (2) residing at —, (3) and doing business at —, (4) hereby applies as —, (5) for registration of the print shown in the accompanying copies, ten of which are furnished.

The print was first published with notice of copyright thereon, on —; (6) its title is —, (7) and it is used for advertising purposes for —. (8) —.

Author [*or proprietor*].

- (1) Insert name of applicant.
- (2) Insert statement of applicant's citizenship or of what ruler he is a subject.
- (3) Insert applicant's residence, domicile or location.
- (4) Insert applicant's place of doing business.
- (5) State whether as author or proprietor; and if as proprietor state also the citizenship of the author (or of what ruler he is a subject) from whom the title is derived.
- (6) Insert date of publication.
- (7) Insert title of print, which must appear on the copies furnished.
- (8) State goods which print is used to advertise.

No. 2207.**For a Firm.**

To the Commissioner of Patents:

The undersigned, —, a firm, domiciled in — and doing business at —, hereby applies as proprietor, the author from whom title is derived being a citizen of [*or subject of*]

—, (1) for registration of the print shown in the accompanying copies, ten of which are furnished.

The print was first published, with notice of copyright thereon, on —, its title is —, and it is used for advertising purposes for —.

—,
Proprietor.

By —,

A member of the firm.

(1) State citizenship of the author (or of what ruler he is a subject).

No. 2208.

For a Corporation.

To the Commissioner of Patents:

The undersigned —, a corporation duly organized under the laws of —, (1) located in —, and doing business at —, hereby applies as proprietor, the author from whom title is derived being a citizen of [or subject of] —, for registration of the print shown in the accompanying copies, ten of which are furnished.

The print was first published, with notice of copyright thereon, on —; its title is — and it is used for advertising purposes for —.

—,
By —,

President [or other officer].

(1) State under the laws of what state or nation organized

No. 2209.

For Executors or Administrators. (1)

To the Commissioner of Patents:

The undersigned —, residing at —, —, (2) of the estate of —, deceased, late a — (3) and a resident of

—, hereby applies as proprietor for the registration of the print shown in the accompanying copies, ten of which are furnished, and of which said —, deceased was the —. (4)

The print was first published, with notice of copyright thereon, on —; its title is —, and it is used for advertising purposes for —

—,
Executor [*or* administrator of the
estate of —, deceased.

(1) When application is filed by an executor or administrator a copy of the letters testamentary or of administration certified by the clerk of the court granting such letters must accompany the application.

(2) State whether executor or administrator.

(3) Insert statement of deceased author's or proprietor's citizenship, or of what ruler he was a subject.

(4) State whether deceased was the author or proprietor; and if proprietor, state also the citizenship of the author (or of what ruler he was a subject) from whom title was derived.

LABELS.**Application for Registration.**

No. 2210.**For an Individual.(1)**

To the Commissioner of Patents:

The undersigned —, a —, residing at —, and doing business at —, hereby applies as — for registration of the label shown in the accompanying copies, ten of which are furnished.

The label was first published with notice of copyright thereon on —; its title is —, and it is used on —.

Author [*or* proprietor].

(1) For the blanks see similar portions of the forms relating to prints, above.

No. 2211.**For a Firm.(1)**

To the Commissioner of Patents:

The undersigned, —, a firm domiciled in —, and doing business at —, hereby applies as proprietor, the author from whom title is derived being a citizen of [*or* subject of] —, for registration of the label shown in the accompanying copies, ten of which are furnished.

The label was first published, with notice of copyright thereon, on —; its title is —, and it is used on —.

Signature of applicant —,

Proprietor.

By —,

A member of the firm.

(1) For blanks, see similar forms under prints, above.

No. 2212.

For a Corporation.(1)

To the Commissioner of Patents:

The undersigned, —, a corporation duly organized under the laws of —, located in —, and doing business at —, hereby applies as proprietor, the author from whom title is derived being a citizen of [or subject of] —, for registration of the label shown in the accompanying copies, ten of which are furnished.

The label was first published, with notice of copyright thereon, on —; its title is —, and it is used on —.

Applicant's name —,

By —,

President [or other officer].

(1) For blanks, see similar forms under prints, above.

No. 2213.

For Executors or Administrators.(*)

To the Commissioner of Patents:

The undersigned, —, (a) residing at —, (b) —, (c) of the estate of —, (d) deceased, late of —, (e) and a resident of —, (f) hereby apply as proprietors for the registration of the label shown in the accompanying copies, ten of

which are furnished, and of which said —, (d) deceased, was the —. (g)

The label was first published, with notice of copyright thereon, on —; (h) its title is —, (i) and it is used on —. (j)

—,
—,
Executors [*or* administrators] of the
Estate of —, (d) Deceased.

(*) When application is filed by an executor or administrator, a copy of the letters testamentary or of administration certified by the clerk of the court granting such letters must accompany the application.

- (a) Give names of executors or administrators.
- (b) Give residence of executors or administrators.
- (c) State whether executors or administrators.
- (d) Insert name of deceased author or proprietor.
- (e) Insert statement of deceased author's or proprietor's citizenship, or of what ruler he was a subject.
- (f) Insert late residence of deceased author or proprietor.
- (g) State whether deceased was author or proprietor, and if proprietor, state also the citizenship of the author (or of what ruler he was a subject) from whom the title was derived.
- (h) Insert date of publication.
- (i) Insert title of label, which must appear on the copies furnished.
- (j) State goods on which the label is used.

The statutory law regarding prints and labels is found in the Act of June 18, 1874, 18 Stat. L. 78, Secs. 3, 4 and 5, and Copyright Act of March 4, 1909, 35 Stat. L. 1075; see opening paragraph (a) and Secs. 7, 8, 9, 18, 23, 24 and 42.

The certificate of registration remains in force twenty-eight years and is renewable for the same period of time.

Prints and labels are distinguishable *inter alias*, by the requirement that the print shall not be borne upon the article to which it pertains, while the label is impressed upon or borne upon the article or a container therefor. Both must be artistic and intellectual productions.

CLERKS' FORMS

CLERK'S ORAL FORMS.(2)

No. 2214.

Oath to Witness (Civil Case).

You do solemnly swear that the testimony you shall give in this issue joined between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth and nothing but the truth. So help you God!

No. 2215.

Oath to Witness (Criminal Case).

You do solemnly swear that the testimony you shall give relating to this issue between the United States of America and C. D., the prisoner at the bar, shall be the truth, the whole truth and nothing but the truth. So help you God!

No. 2216.

Affirmation of Witness (Criminal Case).

You do solemnly, sincerely and truly, declare and affirm, that the testimony you shall give to the court in this issue between the United States of America and C. D., the prisoner at the bar, shall be the truth, the whole truth and nothing but the truth.

And this you affirm under the pains and penalties of perjury.

(1) The following clerk's and marshal's forms are in use generally in the southern district of Ohio, and it is thought that they or their equivalents are in use in all District Courts.

(2) The following forms contain precedents for the use of clerks in proceedings in court, which are not written but pronounced orally.

No. 2217.**Affirmation of Witness (Civil Case).**

You do solemnly, sincerely and truly, declare and affirm, that the testimony you shall give to the court in the case of A. B. against C. D., shall be the truth, the whole truth and nothing but the truth.

And this you affirm under the pains and penalties of perjury.

No. 2218.**Oath Administered to an Officer in Charge of a Jury.**

You do solemnly swear that you will keep this jury in some private and convenient place without meat or drink except water.

You will not communicate with them yourself nor will you suffer others to do so until they have agreed upon their verdict, except by direction of the court. So help you God!

No. 2219.**Oath to Witness on Computation of an Amount Due.**

You do solemnly swear that you will make true answer to such questions as shall be put to you, touching the amount due, in the case of A. B. against C. D. So help you God!

No. 2220.**Oath to Witness Proving Execution of Deed or Other Paper.**

You do solemnly swear, that you will make true answer to such questions as shall be put to you touching the [deed or —] between A. B. of one part and C. D. of the other part. So help you God!

No. 2221.

Oath to Witness (or Party) Touching His Ability to Procure the Attendance of a Subscribing Witness.

You do solemnly swear that you will true answers make to such questions as shall be put to you touching your ability to procure the attendance of —, a subscribing witness to the paper writing now here in question. So help you God!

No. 2222.

Oath to Bondsman or Surety as to His Responsibility.

You do solemnly swear that you will true answers make to such questions as may be put to you touching your pecuniary responsibility. So help you God!

No. 2223.

Oath to Bondsman or Surety as to the Sum He is Worth.

You do solemnly swear that you are worth the sum of \$—— over and above all legal liabilities and property exempt from execution. So help you God!

No. 2224.

Oath to Interpreter (Criminal).

You do hereby solemnly swear, that you will truly interpret between the court, the jury, the counsel and the witness, in this case between the United States of America and C. D., the prisoner at the bar. So help you God!

No. 2225.

Oath to Interpreter (Civil).

You do solemnly swear, that you will truly interpret between the court, the jury, the counsel and the witness in this

issue joined between A. B., plaintiff, and C. D., defendant, to the best of your ability. So help you God!

No. 2226.

Oath of a Party of the Loss or Destruction of a Paper.

You do solemnly swear that you will true answers make to such questions as shall be put to you touching the loss or destruction of any paper that would be proper evidence in this cause. So help you God!

No. 2227.

Oath in Habeas Corpus.

You do solemnly swear that the evidence you shall give to the court in the case of A. B. against C. D. on habeas corpus, shall be the truth, the whole truth and nothing but the truth. So help you God!

No. 2228.

Oath of Attorney on Admission to the Bar.

You do solemnly swear that you will demean yourself as an attorney, counsellor and solicitor of this court, uprightly and according to law, and support the constitution of the United States. So help you God!

No. 2229.

Oath of Referees or Auditors.

You, A. M., as referee [*or* auditor] do solemnly swear that you will faithfully and fairly hear, and examine in this cause between A. B., plaintiff and C. D., defendant, and a just and true report make therein according to the best of your understanding. So help you God!

No. 2230.**Oath Administered by Referee to Witness.**

You do solemnly swear that you will true answers make to such questions as shall be put to you in this cause between A. B., plaintiff, and C. D., defendant, now pending before me as referee. So help you God!

No. 2231.**Oath to Traverse Jury (Civil Case).**

You, each and every of you do solemnly swear that you will well and truly try the issue joined in the case of A. B., plaintiff, against C. D., defendant, and unless sooner discharged by the court, a true verdict render, according to the law and the evidence. So help you God!

No. 2232.**Oath to Traverse Jury (Criminal Case).**

You, each and every of you do solemnly swear, that you will well and truly try, and true deliverance make between the United States of America and C. D., defendant, the prisoner at the bar, according to the evidence given you in court; and the laws of the United States. So help you God!

No. 2233.**Oath to Foreman of Grand Jury.**

Mr. Foreman: You will rise and be sworn.

You do solemnly swear that you will diligently enquire and true presentment make of all such matters and things as shall be given you in charge. That the counsel for the United States, your own, and your fellows you shall keep secret, excepting if you be required in a court of justice to make disclosure. That you shall present no one through hatred, malice or ill-will; nor shall you leave any man unrepresented

through fear, favor, affection or hope of reward. But that you shall present things truly, as they come to your knowledge, according to the best of your understanding. So help you God!

No. 2234.

Oath to the Remaining Grand Jurors.

You, and each and every of you, do solemnly swear, that the same oath which your fellow has taken before you, on his part, you and each of you, shall well and truly observe and keep. So help you God!

No. 2235.

Oath to Juror (or Jurors) on Being Challenged for Cause.

You do solemnly swear that you will true answers make to such questions as may be put to you touching your competency to serve as a juror [*or* jurors] in this cause between A. B., plaintiff, and C. D., defendant. So help you God!

No. 2236.

Oath to Jury on Assessment of Damages (Civil Case).

You, each and every of you, do solemnly swear that you will well and truly assess the damages in the case of A. B. against C. D. and a true assessment make according to the evidence and the instruction of the court. So help you God!

No. 2237.

**Oath to Jury on Trial of a Case of Forcible Entry or Detainer
When Such Trial is Before a Commissioner or Other
Proper Officer.**

You do solemnly swear that you shall well and truly try this matter in difference between A. B., plaintiff, and C. D., de-

fendant, and unless discharged by me, a true verdict render, according to law and the evidence. So help you God!

[Or when such trial is before the court.]

You shall well and truly try this matter in difference between A. B., plaintiff, and C. D., defendant, and unless discharged by the court, a true verdict render according to law and the evidence. So help you God!

No. 2238.

Oath to Jurors Voir Dire.

You and each of you do solemnly swear that you will true answers make to such questions as shall be put to you touching your competency to sit as jurors on the trial of this cause. So help you God!

No. 2239.

Recognizance in Open Court.

You —— as principal and you —— as surety, do acknowledge yourselves to be indebted to the United States of America in the sum of \$—— to be levied of each of you, and each of your goods and chattels, lands and tenements if default be made in the following conditions:

The conditions of this obligation are such, that if the said —— (1) shall be and appear at the [next *or* present] term of this court to be held in the city of ——, the —— day of ——, 19——, and from day to day and from time to time thereafter to answer and stand trial upon [indictment *or* information *or* ——] on file in this court, and not depart without leave, and abide its further order and direction; then this obligation to be void, otherwise of full force and effect.

With this you are content?

(1) The principal named above.

No. 2240.**Personal Recognizance in Open Court.**

You —— do acknowledge yourself indebted to the United States of America in the sum of \$—— to be levied of you and of your goods and chattels, lands and tenements if default be made in the following condition:

The condition of this obligation is such that if you shall be and appear at the [next *or* present] term of this court to be held in the city of —— on the —— day of ——, 19——, and from day to day, and from time to time thereafter, to answer to and stand trial upon an —— on file against you in this court, and not to depart without leave and to abide its further order and direction, then this obligation to be void; otherwise of full force and effect.

With this you are content?

No. 2241.**Crier's Proclamation in Open Court for Persons Bound to Appear.**

Call the principals three times as follows:

Hear ye! hear ye! hear ye! —— come into court and answer to your name, or your bail will be estreated. *Or*, Come into court and answer to your name or you will forfeit your recognizance.

No. 2242.**Proclaim Others for Bail (or Surety) to Produce Principal.**

Call the surety three times in open court as follows:

Bring forth A. B., your principal whom you have undertaken to have here this day, or you will forfeit your recognizance.

No. 2243.**Proclamation or Call for Plaintiff or in Default Thereof Non-suit Will be Entered.**

Call plaintiff's name three times, thus: A. B. come into court! A. B. come into court! A. B. come into court! and prosecute your suit or you will be non-suited. *Or*, after calling three times as above say: And prosecute your suit or your default will be entered.

No. 2244.**Estreating Bail of Principal and Sureties.**

Call defendant's name three times to come into court, and answer the information [*or* indictment] filed against "you for [*here give the nature of the offense*] or you will forfeit your recognizance."

No. 2245.**Polling the Jury.**

By the clerk as follows:

Gentlemen of the Jury:

Answer as your names are called. Call each name and then say to each as oath is to be administered, you do solemnly swear, etc. *Or*, if verdict taken, say to each juror after calling each name: You say that you find, etc.

No. 2246.**Number of Challenges Allowed.**

When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to

six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges. And in all cases where there are several defendants, or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. 36 Stat. L. 1166. *Considine v. United States*, 112 Fed. 342.

No. 2247.

Verdict in Inquest or Inquest of Damages.

Administer oath on assessment of damages as follows:

You, each and every of you, do solemnly swear that you will well and truly assess the damages in the case of A. B. against C. D. and a true assessment make according to the evidence and the instruction of the court. So help you God!

And take verdict as follows:

You say that you find the defendant did undertake and promise, etc., etc. (as in *assumpsit*) and you assess; or

You say that the defendant doth owe (1) to the said plaintiff the sum of \$—— and you assess, etc., etc. [as in *debt*], or

You say that you find that the writing obligatory as alleged in the declaration of the plaintiff is the deed of the defendant herein, and you assess the damages at the sum of \$—— [as in *covenant*].

So say you all?

No. 2248.

Verdict for Plaintiff on Assessment of Damages on Default of Defendant.

You say that you find that the plaintiff has sustained damages to the sum of \$—— which you assess against the defendant.

So say you all?

No. 2249.**Verdict for One Defendant in Assumpsit when One or More**

(or Other) Defendant Let Judgment go by Default.

You say that you find the defendant C. D. did not undertake and promise in the manner and form as the plaintiff has in his declaration alleged.

So say you all?

And you are now discharged from inquiring against the defendant C. D. what damages the plaintiff has sustained by reason of the premises.

No. 2250.**Verdict for Plaintiff in Assumpsit.**

Q. Gentlemen of the jury, have you agreed upon your verdict?

A. We have.

Q. For whom do you find?

A. We find for plaintiff in the sum of \$——.

Take verdict orally as follows:

Gentlemen of the Jury:

You say that you find the defendant did undertake and promise in manner and form as the plaintiff has in declaration alleged, and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2251.**Verdict for Defendant in Assumpsit.**

Q. Gentlemen of the jury have you agreed upon your verdict?

A. We have.

Q. For whom do you find?

A. For defendant.

Take verdict orally as follows:

Gentlemen of the Jury:

You say you find the defendant did not undertake and promise in manner and form as the plaintiff has in his declaration alleged.

So say you all?

No. 2252.

Verdict for Plaintiff in Assumpsit and Assessment of Damages Against Another by Default.

As in No. 2250 after "said plaintiff" say: As well against the defendant C. D. as against the defendant E. D. at the sum of \$——.

So say you all?

No. 2253.

Verdict for Plaintiff on One or More Counts and for Defendant on One or More Counts.

You say that you find the defendant did undertake and promise, etc., etc., and you assess the damage on the —— and —— counts at the sum of \$——; and you further say the defendant did not undertake and promise, etc., etc., as the plaintiff has in the —— and —— counts of the declaration alleged.

• So say you all?

No. 2254.

Verdict for Plaintiff Against Executor or Administrator.

You say that you find that the said —— in his lifetime did undertake and promise, etc., etc., and you assess, etc., etc. (as usual).

So say you all?

No. 2255.**Verdict for Defendant as Executor or Administrator.**

You say that you find that the said —— in his lifetime did not undertake and promise in the manner and form as the plaintiff has in his declaration alleged.

So say you all?

No. 2256.**Verdict for Plaintiff (in Debt).**

You say that you find that the defendant C. D. does owe to the plaintiff A. B. the sum of \$—— as the plaintiff has in his declaration alleged.

So say you all?

No. 2257.**Verdict for Defendant (in Debt).**

You say that you find the defendant C. D. is not indebted to A. B., the plaintiff, as he has in his declaration alleged.

So say you all?

No. 2258.**Verdict for Plaintiff (in Covenant).**

You say that you find that the writing obligatory as alleged in the declaration of A. B., the plaintiff, is the [deed or bond or ——] of C. D., the defendant herein, and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2259.**Verdict for Defendant (in Covenant).**

You say that you find that the writing obligatory as alleged by the plaintiff in his declaration is not the [deed *or* bond *or* as may be] of the defendant herein.

So say you all?

No. 2260.**Verdict for Defendant for Balance Due on Set-off.**

You say that you find that there is due from the said plaintiff to the said defendant, over and above the amount proven on the trial to be due from the said defendant to the said plaintiff the sum of \$——.

No. 2261.**Verdict for Plaintiff (in Trespass).**

You say that you find the defendant C. D. is guilty in manner and form of the trespass as alleged by the plaintiff in his declaration and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2262.**Verdict for Defendant (in Trespass).**

You say that you find the defendant C. D. is not guilty in manner and form of the trespass as alleged in the plaintiff's declaration.

So say you all?

No. 2263.**Verdict in Trespass when One or More Defendants are Found Guilty, and One or More Acquitted.**

You say that you find the defendant C. D. is guilty in manner and form of the trespass as alleged in the plaintiff's declaration, and you assess the damages at the sum of \$——, and you further say that the defendant E. D. is not guilty in the manner and form of the trespass as alleged in the plaintiff's declaration.

So say you all?

No. 2264.**Verdict for Plaintiff in Trover.**

You say that you find the defendant is guilty of the premises laid to his charge as alleged in the plaintiff's declaration and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2265.**Verdict for Defendant in Trover.**

You say that you find the defendant is not guilty of the premises laid to his charge as alleged in the plaintiff's declaration.

So say you all?

No. 2266.**Verdict for Plaintiff in "Trespass on the Case" or "Case."**

Same as in Trover. See No. 2264.

No. 2267.**Verdict for Defendant in "Trespass on the Case" or "Case."**

Same as in Trover. See No. 2265.

No. 2268.**Verdict for Plaintiff in Ejectment.**

You say that you find the defendant is guilty of unlawfully withholding the land and premises described in the plaintiff's declaration, and that the said plaintiff is well entitled to hold the same [in fee *or* — as the case may be], as he has alleged, and you assess the damages of the said plaintiff at the sum of \$—— [*or* six cents].

So say you all?

No. 2269.**Verdict for Defendant in Ejectment.**

You say that you find the defendant is not guilty of unlawfully withholdnig the lands and premiesies as described in the plaintiff's declaration.

So say you all?

No. 2270.**Verdict in Ejectment for One Plaintiff and for Defendant for Other Plaintiffs.**

You say that you find the defendant C. D. is guilty of unlawfully withholding the lands and premises described in the declaration of A. B., plaintiff herein; and you further say that the defendant C. D. is not guilty of the matters laid to his charge as the plaintiffs C. B. and D. B. have alleged.

So say you all?

No. 2271.**Verdict in Ejectment of Part for Plaintiff and Part for Defendant.**

You say that you find the defendant is guilty of unlawfully withholding the lands and premises described in the —

count of the plaintiff's declaration, and as to the residue of the premises the defendant is not guilty of the matters laid to his charge as the plaintiff has in said declaration alleged.

So say you all?

No. 2272.

Verdict for Plaintiff in Replevin when Property has been Replevied.

You say that you find the defendant did unlawfully detain the goods and chattels as described and alleged in the plaintiff's declaration and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2273.

Verdict for Plaintiff in Replevin when Property has not been Replevied.

You say that you find the defendant does unlawfully detain the goods and chattels as described and alleged in the plaintiff's declaration and you assess the damages of the said plaintiff at the sum of \$——.

So say you all?

No. 2274.

Verdict for Defendant in Replevin and Assessment of His Damages.

You say that you find the defendant did not unlawfully detain the goods and chattels as alleged in the plaintiff's declaration and you assess the damages of the defendant herein at the sum of \$——.

So say you all?

No. 2275.**Verdict for Defendant and Assessment when He Has a Special Property in the Goods and Chattels.**

You say that you find the defendant did not unlawfully detain the goods and chattels as alleged in the plaintiff's declaration and you assess the damages of the said defendant at the sum of \$——; and you further say the plaintiff is the general owner of the said goods and chattels, and that the defendant has a special property in the same to the amount of \$——.

So say you all?

No. 2276.**Proclamation by Crier Opening Court.**

As the court enters the court room, all persons in the room arising, the marshal or crier should say:

"The judge [*or judges*] of the District Court of the United States for the —— district of ——."

When the judge has taken his place on the bench the marshal or crier should make the following proclamation opening court:

"Hear ye! hear ye! The District Court of the United States for the —— district of —— is met pursuant to adjournment. All persons having business with this honorable court draw near, give attention and you shall be heard. God save the United States and this honorable court."

CLERKS' PRINTED FORMS. (*)**No. 2277.****Entry (General Form).**

The District Court of the United States
for the — District of —.

— }
vs. } No. —. —.
— }

This cause came on to be — heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

No. 2278.**Certified Copy of Entry.**

The United States of America,
— District of —, ss.

At a stated term of the — court of the United States of America, within and for the — district of —, in the — judicial circuit of the United States of America, begun and had in the court-rooms, at the city of —, in said district, on the first Tuesday of —, being the — day of that month, in the year of our Lord one thousand nine hundred and —, and of the independence of the United States of America, one hundred and —.

Present, the Honorable —.

On —, the — day of —, 19—, among the proceedings had were the following, to wit:

(*) Consult the preceding forms for Writs, Notices, Subpoenas, Citations, etc.

The United States of America,

— District of —, ss.

I, — clerk of the — court of the United States, within and for the district aforesaid, do hereby certify that the foregoing — is truly taken and correctly copied from the journal(1) of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of —, this — day of —, 19—.

—, Clerk.

By —, Deputy.

(1) The books to be kept by the clerk for equity proceedings and the entries to be made therein are prescribed by Equity Rule No. 3.

No. 2279.

Certificate of Copy of Entry Allowed in Chambers.

The United States of America,

— District of —, ss.

— }
vs. } No. —. —.
— }

Be it remembered, that on a hearing before the honorable —, sitting at chambers on the — day of —, 19—, the following order was made and signed, and ordered to be entered upon the records of the court in the above entitled cause, to wit:

The United States of America,

— District of —, ss.

I, —, clerk of the Circuit Court of the United States, within and for the district aforesaid, do hereby certify that the above is a true copy of —, entered upon the order book of said court in the case therein entitled; that I have compared the same with the original entry of said —, and it is a true transcript therefrom and of the whole thing.

Witness my official signature and the seal of said court at
—, in said district, this — day of —, 19—, and in
the — year of the independence of the United States of
America.

—, Clerk.
By —, Deputy.

No. 2280.

Certificate for Copy.

The United States of America,
— District of —, ss.

I, —, clerk of the — court of the United States, within
and for the district aforesaid, do hereby certify that —.

In estimony whereof, I have hereunto set my hand, and
affixed the seal of the said court, at —, this — day of
—, 19—.

Clerk — Court of the United States.
By —, Deputy.

No. 2281.

Certificate as to Official Character of Clerk by a Judge.

The United States of America,
— District of —, ss.

I, —, judge of the — court of the United States within
and for the district aforesaid, the same being a court of record,
within and for the district aforesaid, do hereby certify that
— is clerk of said court, and was such clerk at the time of
making and subscribing to the foregoing certificate —, and
that the attestation of said clerk is in due form of law and by
the proper officer.

In testimony whereof, I do hereby subscribe my name at
—, —, this — day of —, 19—. —,

Judge of the — Court of the United
States for the — District of —.

No. 2282.**Certificate as to Official Character of Judge by the Clerk of the Court.**

The United States of America,
— District of —, ss.

I, —, clerk of the — court of the United States, within and for the district aforesaid, do hereby certify that —, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, judge of the — court, within and for the district aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at —, this — day of —, 19—.

— —,
Clerk — Court of the United States,
By —, Deputy.

No. 2283.**Certificate as to Searching Record.**

The United States of America,
— District of —, ss.

I, —, clerk of the Circuit Court of the United States, within and for the district aforesaid, do hereby certify that I have searched the records of said court and find no judgments or suits pending therein, by or against —.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at —, this — day of —, 19—.

—, Clerk.
By —, Deputy.

No. 2284.**Order of Court to Pay Account.**

At a stated term of the District Court of the United States within and for he — judicial circuit and the — district of —, begun and held at the city of —, on the first Tuesday of —, being the — day of that month, in the year of our Lord one thousand nine hundred and —, and of the independence of the United States of America the —.

Present, the Honorable —, district judge.

Among the proceedings had were the following, to wit:

—, 19—.

Whereas — has presented to this court an account for his services for the — quarter, 19—, and in presence of —, Esq., United States attorney, has proved on oath to the satisfaction of the court that the services therein charged have been actually and necessarily performed as therein stated; and whereas said charges appear to be just and according to law, it is ordered that said account, amounting to — dollars and — cents (\$—) be and the same hereby is approved.

I, —, clerk of said court, do hereby certify that the foregoing is a true copy of an order entered upon the journal of said court.

Witness my official signature and the seal of said court, at —, this — day of —, 19—.

—, Clerk.

By —, Deputy Clerk.

No. 2285.**Schedule No. 1.(1)**

The District Court for the —
District of —.

| | | | | | |
|--|---|-------|--|--|--|
| | For attendance on court while in session on the following days, to wit: | | | | |
| | | days, | | | |
| | | days, | | | |
| | | days, | | | |
| | Travel from Cincinnati (residence of clerk) to Columbus, the place of holding court for the eastern division, and return, — trips, each trip 240 miles, at 5c. per mile | | | | |
| | For miscellaneous fees, for services rendered, as follows: | | | | |
| | Making entries on journal— | | | | |
| | Opening and adjournment of court, — days, — folios, each folio, .15 | | | | |
| | Order for grand jury, — folios, each folio,15 | | | | |
| | Empanelment of grand jury, — folios, each folio,15 | | | | |
| | Reports of grand jury, — folios, each folio,15 | | | | |
| | Approving appointment of bailiffs, — folios, each folio,15 | | | | |
| | Appointment U. S. commissioners, — folios, each folio,15 | | | | |
| | Excusing jurors, — folios, each folio,15 | | | | |
| | Ordering rule to show cause to issue, — folios, each folio, . . .15 | | | | |
| | Ordering rule to show discharged, — folios, each folio,15 | | | | |
| | Ordering attachment to issue, — folios, each folio,15 | | | | |
| | Ordering attachment discharged, — folios, each folio,15 | | | | |
| | Entering sentence for contempt of court, — folios, each folio, . . .15 | | | | |
| | Entering approval of — accounts of district attorney, — folios, each folio,15 | | | | |
| | Entering approval of — accounts of marshal, — folios, each folio, .15 | | | | |
| | Entering approval of — accounts of clerk, — folios, each folio, . .15 | | | | |

| | |
|--|----|
| Entering approval of — accounts of U. S. commissioners, — folios, each folio, | 15 |
| Order to pay grand jurors, — folios, each folio, | 15 |
| Order to pay petit jurors, — folios, each folio, | 15 |
| Order to pay grand jury witnesses, — folios, each folio, | 15 |
| Application for appointment of chief supervisor of elections, — folios, each folio, | 15 |
| Appointing chief supervisor of election, — folios, each folio, | 15 |
| Resignation of chief supervisor, — folios, each folio, | 15 |
| Approving appointment of supervisors of election, — folios, each folio, | 15 |
| Making certified copies of journal entries, to wit: | |
| Allowance to district attorney, — folios, each folio, roc., ctfc. and seal, | 35 |
| Approval of accounts of district attorney, — folios, each folio, roc., ctfc. and seal, | 35 |
| Approval of accounts of marshal, — folios, each folio, roc., ctfc. and seal, | 35 |
| Approval of accounts of clerk, — folios, each folio, roc., ctfc. and seal, | 35 |
| Approval of accounts of U. S. commissioners, — folios, each folio, roc., ctfc. and seal, | 35 |
| Order to pay grand jurors, — folios, each folio, | 10 |
| Order to pay petit jurors, — folios, each folio, | 10 |
| Order to pay grand jury witnesses, — folios, each folio, | 10 |
| Other miscellaneous fees: | |
| Filing — applications for grand jury, each, .10 | 10 |
| Filing — precipes for grand jury witnesses, each, .10 | 10 |
| Issuing — subpoenas for grand jury witnesses, each, 25 | 25 |
| Filing and entering return on — subpoenas for grand jury witnesses, each, .25 | 25 |

| | |
|---|------------|
| Swearing — jurors to attendance and travel, | each, .10 |
| Swearing — grand jury witnesses to attendance and travel, . . | each, .10 |
| Swearing — bailiffs, | each, .10 |
| Filing — transcripts of U. S. commissioners, | each, .10 |
| Filing — other papers of U. S. commissioners, | each, .10 |
| Filing — monthly reports of U. S. commissioners, | each, .10 |
| Issuing — commissions to supervisors of elections, | each, 1.00 |
| Filing — duplicate accounts of U. S. officers, | each, .10 |
| Issuing rule to show cause, each, | 1.00 |
| Filing and entering return thereon, | each, .25 |
| Issuing order of attachment, each, | 1.00 |
| Filing and entering return thereon, | each, .25 |
| Total amount of schedule, | |

(1) R. S. U. S., Sec. 828, prescribes fees of clerks of United States District Courts, and by Act of February 26, 1919, the clerks were placed upon a salary basis. 40 Stat. L. 1182.

No. 2286.

Schedule No. 2—Civil Cases.

The District Court for the —
District of —.

| | | | | |
|---|------|--|--|--|
| For fees in the following cases, in which the United States is plaintiff: | | | | |
| Filing petition, | 10 | | | |
| Entering rule day for answer, . . . | 30 | | | |
| Filing preceipe for summons, . . . | 10 | | | |
| Issuing summons, | 1.00 | | | |
| Filing and entering return on sum- | | | | |
| mons, | 25 | | | |
| Filing — stipulations, . . each, . | 10 | | | |
| Filing — replications, . . each, . | 10 | | | |
| Filing — demurrers, . . . each, . | 10 | | | |
| Filing — motions, each, . | 10 | | | |
| Filing — affidavits, . . . each, . | 10 | | | |
| Filing and opening — deposi- | | | | |
| tions, | 25 | | | |
| Filing — preceipes for witnesses, | | | | |
| each, | 10 | | | |
| Issuing — subpoenas for wit- | | | | |
| nesses, | 25 | | | |
| Filing and entering return on — | | | | |
| subpoenas, | 25 | | | |
| Swearing — witnesses to testify, | | | | |
| each, | 10 | | | |
| Swearing — witnesses to attend- | | | | |
| ance and travel, | 10 | | | |
| Entering order to pay witnesses, . | | | | |
| each, | 15 | | | |
| Copying order to pay witnesses to | | | | |
| marshal, | 10 | | | |
| Entering — on journal, — folios, | | | | |
| each, | 15 | | | |
| Entering — on journal, — folios, | | | | |
| each, | 15 | | | |
| Entering — on journal, — folios, | | | | |
| each, | 15 | | | |
| Entering judgment, — folios, each, | 15 | | | |
| Dockets, indexes, etc., | | | | |
| Commission on — received and paid | | | | |
| out, at 1 percent, | | | | |
| Final record, — folios, each, . . | 15 | | | |

No. 2287.**Schedule No. 3—Criminal Cases.**

The District Court for the —
District of —.

| | | | | | |
|---|-----------------|--|--|--|--|
| Filing indictment, | .10 | | | | |
| Filing precipe for capias, | .10 | | | | |
| Issuing capias, | 1.00 | | | | |
| Filing and entering return on capias, | .25 | | | | |
| Entering arrangement and plea, — folios, | each folio, .15 | | | | |
| Taking recognizance, — folios, | each folio, .25 | | | | |
| Filing written recognizance, each, | .10 | | | | |
| Swearing sureties, | each, .10 | | | | |
| Certificate and seal thereto, | each, .35 | | | | |
| Issuing temporary mittimus, | 1.00 | | | | |
| Filing and entering return on temporary mittimus, | .25 | | | | |
| Filing affidavit under crimes act, | .10 | | | | |
| Entering order to subpoena defendant's witnesses, — folios, each, | .15 | | | | |
| Filing — precipes for witnesses, each, | .10 | | | | |
| Issuing — subpoenas for witnesses, | each, .25 | | | | |
| Filing and entering return on — subpoenas, | each, .25 | | | | |
| Entering trial and verdict, — folios, | each, .15 | | | | |
| Swearing — witnesses to testify, each, | .10 | | | | |
| Swearing — witnesses to attendance and travel, | each, .10 | | | | |
| Entering orders to pay — witnesses, — folios, | each, .15 | | | | |
| Copying orders to pay — witnesses for marshal, — folios, each, | .10 | | | | |
| Filing — motions, | each, .10 | | | | |
| Filing verdict, | .10 | | | | |
| Entering sentence, — folios, each, | .15 | | | | |
| Issuing final commitment, | 1.00 | | | | |
| Filing and entering return on final commitment, | .25 | | | | |
| Entering order of distribution, — folios, | each, .15 | | | | |
| Commission on \$ —, received and paid out, at 1 percent, | | | | | |
| Dockets, indexes, etc., | | | | | |
| Entering final record, — folios, each, | .15 | | | | |

No. 2288.

Quarterly Statement of Clerk.

Account of —, Clerk,
For quarter ending —, 19—.

The United States, Dr.

To —, Clerk of the District Court of the United States
within and for the — District of —.

For compensation and fees for services rendered the United
States in said courts during the quarter ending —, 18—,
as follows, to wit:

DISTRICT COURT.

Schedule No. 1, per diems and miscellaneous fees, \$——.
Schedule No. 2, civil cases..... \$——.
Schedule No. 3, criminal cases..... \$——.

The United States of America,
— District of —, ss.

I, —, clerk of the said courts, do solemnly swear that
the services charged in the foregoing account have been
actually and necessarily performed as therein stated, and that
all the items stated in said schedules are correct and legal,
and the amounts justly due me, as I verily believe, so help
me God.

Subscribed and sworn to before me this — day of —,
19—.

U. S. Commissioner.

No. 2289.

Order Approving Clerk's Account.

At a stated term of the District Court of the United States,
within and for the — judicial circuit, and the — district
of —, begun and held at the city of — on the first
Tuesday of —, being the — day of that month, in the

year of our Lord one thousand nine hundred and —, and of the independence of the United States of America the —. President, the Honorable —, district judge.

Among the proceedings had were the following, to wit:
—, 19—.

Whereas, —, clerk, has presented to this court an account for his services for the — quarter, 19—, and in presence of —, Esq., United States attorney, has proved on oath, to the satisfaction of the court, that the services therein charged have been actually and necessarily performed as therein stated, and that per diem compensation has only been charged for days when business was actually transacted in court; and whereas said charges appear to be just and according to law, it is ordered that said account, amounting to — dollars and — cents (\$—) be and the same hereby is approved.

The United States of America,
— District of —, ss.

I, —, clerk of said court, do hereby certify that the foregoing is a true copy of an order entered upon the journal of said court.

Witness my official signature and the seal of said court, at —, —, this — day of —, 19—.

—, Clerk,
By —, Deputy.

No. 2290.

Oath of Office.

The United States of America,
— District of —, ss.

I do solemnly swear [*or, affirm*] that to the best of my knowledge and ability I will support and defend the con-

stitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the office on which I am about to enter. And I do further solemnly — that I will faithfully execute all lawful precepts directed to the marshal of the — district of —, under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of deputy marshal of the — district of —, during my continuance in said office, and take only my lawful fees. So help me God.

Sworn and subscribed before me this — day of —, 19—, — —.

No. 2291.

.. **Designation to Hold District Courts.**

The United States of America,
— Judicial Circuit, ss.

To the Hon. —, Judge of the District Court of the United States for the — District of —.

Whereas, in my judgment, the public interest so requires, you are, pursuant to Section 13(1) of the Judicial Code, hereby designated and appointed to hold the — term of the District Court for the — District of — at the city of —, in place or in aid of the proper district judge of such district, and to discharge all the judicial duties of such judge from the — day of — to the — day of —, 19—. —, 19—.

Circuit Judge.

(1) Secs. 13 to 20 of the Judicial Code deal with this subject, and the designation may be made under some section other than 13, in which case insert the pertinent number.

No. 2292.**Summons for Jurors.**

The United States of America,
— District of —, ss.

The President of the United States of America to the Marshal
of the — District of —, Greeting:

We command you to summon, without delay, [*space for names*], to be and appear before our — court of the United States, within and for the district aforesaid, at the court rooms in the city of —, on —, the — day of —, 19—, at — o'clock — M., then and there to serve as — jurors for and during the — term, 19—, of said court, and not depart the court without the leave thereof.

Hereof fail not, and have then and there this writ, with your proceedings thereon.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this — day of —, 19—, and in the — year of the independence of the United States of America.

Attest: —,

Clerk — Court of the United States,

By —, Deputy.

No. 2293.**Report of Committee on Application for Admission to Bar.**

The United States of America,
— District of —, ss.

We, the committee appointed to examine —, esquire, of —, an applicant for admission to the bar, have the honor to make the following report.

We find the applicant to be a member of the bar of the several courts of the state of —, in good standing, of good moral character, and qualified to practice in the courts of the United States as an attorney and counselor at law, solicitor

in chancery, and proctor and advocate in admiralty, and recommend his admission accordingly.

_____,
_____,
_____,

Committee.

No. 2294.

Certificate of Admission to the Bar.

The United States of America,
____ Circuit and
____ District of _____, ss.

Be it known, that _____, Esq., has been duly examined, and regularly admitted to practice as a solicitor, attorney, and counselor at law, and proctor and advocate in admiralty, in and for the _____ circuit and _____ district of _____, at the term of _____, begun and holden at _____ on the _____ day of _____, in the year of our Lord one thousand nine hundred and _____, and is hereby authorized to appear as such, according to the rules and practice of said courts, the laws of the United States and the state of _____.

In testimony whereof, I have hereunto set my name and affixed the seal of the said court, at the city of _____, this _____ day of _____, 19____, and of the independence of the United States of America the _____.

Clerk of the District Court, for
the _____ District of _____.

No. 2295.

United States Commissioner's Certificate.

The United States of America,
The District Court of the United States,
____ District of _____, ss.

Be it known, that _____, Esq., has been duly appointed and commissioned as a United States commissioner in and for

the — circuit, and — district of —, at the term of —, begun and holden at — on the — day of —, in the year of our Lord one thousand nine hundred and —. And he is hereby authorized to take acknowledgments of bail and affidavits, and to take depositions of witnesses, and to do and perform all other acts and duties, according to the rules and practice of said courts, the laws of the United States and the state of —.

In testimony whereof, I have hereunto set my name and affixed the seal of the said court, at the city of —, this — day of —, 19—, and of the independence of the United States the —.

—, Clerk.

By —, Deputy.

No. 2296.

Oath of Expenses of Witness on Behalf of the United States.

The United States of America, — Term, 19—. — District of —.

The United States }
vs. — } — Court.
— .

— being duly sworn, says that he is —; that he has attended as a witness on behalf of the United States in the above-entitled cause, and has been discharged; that as such witness he has incurred and paid the following necessary expenses, to wit: —.

Subsistence en route, —.

Subsistence at —.

That he has not received, and is not entitled by the regulations of the bureau or department in whose service he is employed to claim or receive, any allowance whatever for the

above expenses; that the same are due and wholly unpaid; that he has not charged, and does not intend to charge, the same, or any part thereof, against any other fund, department, or officer of the United States; and further says not.

_____,
_____.

Subscribed and sworn to before me this ____ day of _____,
19____.

_____,
Clerk ____ Court.

No. 2297.

Statement of Court Funds.(1)

The ____ Court of the United States,
____ District of ____.

____, ____, 19____.

Sir: I have the honor to report moneys in the custody of this court at the close of the week ending ____, 19____, as follows:

| | |
|---|---------------|
| With Assistant Treasurer U. S. at ____ , ____ , . | \$ _____ |
| With ____ National Bank, of ____ , ____ , . . . | _____ |
| With ____ National Bank of ____ , ____ , . . . | _____ |
| Held otherwise, | _____ |
| | \$ _____ |
| | _____, Clerk. |

The Treasurer of the United States.

NOTE.—This statement should be made and forwarded to the Treasurer of the United States at the close of business on Saturday of each week.

No. 2298.**Receipt to Clerk for Money Paid Out.**

Original. (1)

Clerk's Office of the United States — Court,
 — District of —.

\$ —. —, —, 19—.

Received of —, clerk of the United States — court,
 the sum of — dollars, on account of —, during the six
 months ending —, 19—. —.

(1) Have a duplicate like original.

No. 2299.**Receipt by Clerk for Money Received.**

— } Clerk's Office,
 vs. — Court, — District of —.
 — } Doc. —. No. —.

—, —, 19—.
 Received of —, — dollars, being —, which amount
 is also receipted on docket. —, Clerk.
 —, Deputy.

No. 2300.

Blank for Taxing Costs in a Circuit Court of Appeals.(1)

United States Court of Appeals for the ——— Circuit.

_____,
vs. } No. _____.
_____.

STATEMENT OF COSTS.

| | | \$ | Cts. |
|--|---------|--------|------|
| Docketing cause and filing record | | \$5.00 | |
| appearances | @ | .25 | |
| continuances | | .25 | |
| Filing papers | | .25 | |
| Filing briefs | | 5.00 | |
| Transfer to Docket | | 1.00 | |
| Argument | | .20 | |
| Submission | | .20 | |
| Judgment or decree | | 1.00 | |
| Filing same | | .25 | |
| Recording same, folios | | .20 | |
| Mandate | | 5.00 | |
| Opinion | 1.00 to | 5.00 | |
| Writ of error | | 5.00 | |
| Costs and copy | | .40 | |
| Telegrams and expressage | | | |
| Clerk's costs | | | |
| Cost of printing record | | | |
| Attorney's docket fee | | | |
| Received payment for the costs taxed above, except the attorney's docket fee. | | | |
| Dated at _____ | | | |

Clerk United States Circuit Court of Appeals, ——— Circuit.

(1) See order of Supreme Court of the United States dated February 28, 1898, made in pursuance of 29 Stat. L. 536, chap. 263, dated February 19, 1897.

NATURALIZATION OF ALIENS¹

No. 2301.

Declaration of Intention.

(Invalid for all purposes seven years after the date hereof.)

_____, ss.

I, _____, aged _____ years, occupation _____, do declare on oath (affirm) that my personal description is: Color _____, complexion _____, height _____, weight _____, color of hair _____, color of eyes _____, other visible distinctive marks _____; I was born in _____ on the _____ day of _____, Anno Domini _____; I now reside at _____; I emigrated to the United States of America from _____ on the vessel _____; my last foreign residence was _____. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to _____, of which I am now a citizen [subject]; I arrived at the [port] of _____, in the state [territory or district] of _____ on or about the _____ day of _____ Anno Domini _____; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

[Original signature of declarant] _____.

Subscribed and sworn to [affirmed] before me this _____ day of _____, Anno Domini _____.

[Official character of testator.] _____.

(1) Act of Congress of June 29, 1906, 34 Stat. L. 596, at Sec. 27, provides forms which shall be used "substantially" as set forth. These forms cover (a) Declaration of Intention; (b) Petition for Naturalization; (c) Affidavit of Witnesses; (d) Certificate of Naturalization; (e) Stub of Certificate of Naturalization.

Exact identity in form is not required, and the Declaration of Intention may be amended. U. S. v. Viaropulos, 221 Fed. 485.

No. 2302.**Petition for Naturalization.**

— Court of —.

In the matter of the petition of — to be admitted as a citizen of the United States of America.

To the — Court.

The petition of — respectfully shows:

First. My full name is —.

Second. My place of residence is number — street, city of —, state [territory or district] of —.

Third. My occupation is —.

Fourth. I was born on the — day of — at —.

Fifth. I emigrated to the United States from —, on or about the — day of —, Anno Domini —, and arrived at the port of —, in the United States, on the vessel —.

Sixth. I declared my intention to become a citizen of the United States on the — day of — at —, in the — court of —.

Seventh. I am — married. My wife's name is —. She was born in — and now resides at —. I have — children, and the name, date, and place of birth and place of residence of each of said children is as follows: — —; — —; — —.

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the constitution of the United States. and it is my intention to become a citizen of the United States, and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to —, of which at this time I am a citizen [or subject], and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since —, Anno Domini —,

and in the state [territory *or* district] of — for one year at least next preceding the date of this petition, to wit, since — day of —, Anno Domini —.

Eleventh. I have not heretofore made petition for citizenship to any court. [I made petition for citizenship to the — court of — at —, and the said petition was denied by the said court for the following reasons and causes, to wit, —, and the cause of such denial has since been cured or removed.]

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Commerce and Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated —.

[Signature of petitioner] —.

—, ss.

—, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this — day of —, Anno Domini —.

—, Clerk of the — Court.

No. 2303.

Affidavit of Witnesses.

— Court of —.

In the matter of the petition of — to be admitted a citizen of the United States of America.

—, ss.

—, occupation —, residing at —, and — duly, and respectfully sworn, deposes and says that he is a citizen of the

United States of America; that he has personally known —, the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the state [territory *or* district] in which the above-entitled application is made for a period of — years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States. —.

Subscribed and sworn to before me this — day of — nineteen hundred and —.

[Official character of attester.]

No. 2304.

Certificate of Naturalization.

Number —.

Petition, volume —, page —.

Stub, volume —, page —.

[Signature of holder] —.

Description of holder: Age, —; height, —; color, —; complexion, —; color of eyes, —; color of hair, —; visible distinguishing marks, —. Name, age, and place of residence of wife, —, —, —. Names, ages, and places of residence of minor children, —, —, —; —, —, —; —, —, —. —, ss.

Be it remembered, that at a — term of the — court of —, held at — on the — day of —, in the year of our Lord nineteen hundred and —, —, who previous to his [her] naturalization was a citizen or subject of —, at present residing at number —, street — city [town] — state [territory *or* district], having applied to be admitted a

citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this state for one year immediately preceding the date of the hearing of his [her] petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that — he was entitled to be so admitted, it was thereupon ordered by the said court that — he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the — day of —, in the year of our Lord nineteen hundred and —, and of our independence the —.

—,
Official character of attessor.

—
No. 2305.

Stub of Certificate of Naturalization.

No. of certificate, —.

Name, —; age, —.

Declaration of intention, volume —, page —.

Petition, volume —, page —.

Name, age, and place of residence of wife, —, —, —.

Names, ages, and places of residence of minor children, —,
—, —; —, —, —; —, —, —, —,
—, —.

Date of order, volume —, page —.

Signature of holder —.

MARSHAL'S BLANKS

No. 2306.

Notice to Appear as Witness.(1)

To —.

By virtue of a subpoena, issued out of the district court of the United States, for the — district of —, and herewith shown unto you, you are required to be and appear before the said court, at —, on —, the — day of —, 19—, on behalf of the United States, and not to depart said court without leave. If you fail to obey such subpoena, you may be fined and imprisoned, as the court shall direct. —,

United States Marshall for the District of —.

—,
Deputy.

Take notice.—You will (if you appear at the place appointed, and continue in court) be entitled to \$1.50 per day for attendance, and five cents per mile each way for necessary travel, but if you are called on the first day or any other day, either in the forenoon or afternoon, and fail to answer, your fees for the day may be deducted, and a fine imposed on you by the court. Hand this notice to the United States district attorney on your arrival at court.

(1) This notice is used in some districts.

No. 2307.**Return of Marshal of Service of Subpoena.**

The United States of America,
 — District of —, ss.

I received this writ at Cincinnati, at — o'clock — M.,
 on the — day of —, 19—, and served the same by copy
 as follows:

Personally, on —, at — o'clock — M., on the —
 day of —, 19—.

At residence, —, at — o'clock, — M., on the —
 day of —, 19—.

And the other persons named in said writ are "not found"
 in said district this — day of —, 19—.

The distance from the court to the place of service most
 remote therefrom is — miles; and the extra travel neces-
 sary to serve the other persons named herein is — miles;
 and my actual and necessary expenses in serving this writ
 are, by dates and items, as follows:

—19—, — —, I paid to —, for —, \$—.

Total expenses, \$—.

United States Marshal,

Per —, Deputy.

No. 2308.**Marshal's Summons for Juror.**

The United States of America,
 — District of —.

To —. United States Marshal's Office,
 —, 19—.

Sir: You are hereby summoned to attend as a — juror
 at the — court of the United States, for the — district
 of —, to be held in the United States court house at —,

in the county of —, on Monday, the — day of — next,
at — o'clock A. M. Hereof fail not.

Given under my hand the day and year above written.

_____,
United States Marshal for the
— District of —.

No. 2309.

Claim of Juror for Fees.

The United States,

To —, Dr.

For attendance as — upon the — court of the United
States for the — district of — on the following days, viz.:
— days at \$3.00 per day, \$—.

Received, —, —, 19—, of —, marshal of the United
States for said district, — dollars, in full of the foregoing
account. _____

No. 2310.

Order to Pay Witness Fees (1) (Payroll).

The United States of America,
— District of —, ss.

The United States of America } Cause No. —. Before —, Commissioner of the United States
ss. } — Court within and for said District. Defendant charged
— with —. Cause disposed of on the — day of —, 19—.

| NAMES OF WITNESSES. | RESIDENCE. | FOR ATTENDANCE. | | FOR TRAVEL. | | TOTAL. | WITNESSES' ORIGINAL SIGNATURES RECEIPTING FOR AMOUNT PAID. |
|---------------------|------------|-----------------|---------|-------------|---------|--------|--|
| | | DAYS. | AMOUNT. | MILES. | AMOUNT. | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

I hereby approve and certify to the materiality and importance of each of the above-named witnesses in behalf of the United States, in the cause designated above.

Witness my official signature, this — day of —, 19—.

United States District Attorney for said District.

The several persons named above having attended the examination in the above cause as witnesses on the part of the United States, it is hereby ordered that the marshal pay to them the sums set opposite to their respective names, for attendance the number of days, and travel the number of miles, stated above.

Witness my official signature, this — day of —, 19—.

Commissioner of the — Court in and for said District.

(1) See R. S. Secs. 848, 855, and 981.

No. 2311.**Certificate as to Executions.**

The United States of America,
 — District of —, ss.

I, —, marshal of the United States, within and for the district aforesaid, do hereby certify that I have no executions in my hands issued out of any of the courts of the United States requiring me to levy upon goods or chattels, lands or tenements owned by —.

In witness whereof, I have hereunto set my hand, at —, this — day of —, 19—.

United States Marshal.

By —, Deputy.

No. 2312.**Commission of Deputy Marshal.**

The United States of America,
 — District of —.

To All who shall see these Presents, Greeting:

Know ye, that reposing special trust and confidence in the integrity, ability, and diligence of —, of — county, —, I have appointed him a deputy marshal of the United States, in and for the — district of —, and do authorize and empower him to execute and fulfill the duties of that office according to law, until this commission is revoked.

In testimony whereof I have hereunto set my hand, at —, this — day of —, 19—.

Marshal of the United States, for
 the — District of —.

[Add oath of office. See No. 2290.]

No. 2313.

Bond of Deputy Marshal.

Know all Men by these Presents:

That we, —, as principal, and —, and —, as sureties, all of — county, and state of —, are hereby firmly bound unto —, marshal of the United States for the — district of —, in the sum of — dollars, lawful money of the United States, to be paid to the said —, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this — day of —, 189—.

The condition of the above obligation is such that, whereas, the said —, marshal of the United States for the — district of —, has appointed the said — to be deputy marshal of the United States for the said district: Now, therefore, if the said — shall well and truly perform all and singular the duties of said office according to law, and keep the said marshal as aforesaid harmless and indemnified on account of his acts as such deputy marshal, then this obligation to be void; otherwise to remain in full force and virtue.

Executed in the presence of

—.
—.
—.

—, [Seal.]
—, [Seal.]
—, [Seal.]

The State of Ohio,
— County.

I hereby certify that —, sureties on the bond of —, deputy United States marshal for the — district of —, are good for the amount of said bond. —,

County Treasurer of — County.

No. 2314.

Voucher and Receipt for Bailiff's, Crier's, etc., Fees.

The United States of America,

By —, United States Marshal, — District of —,

To —, Dr.

189—.

| | | | | | | | | | | | | |
|--|----|----|----|----|----|----|----|----|----|----|----|--|
| For services as — in attendance on the United States courts for the — district of —, for the quarter ending —, 18—. | | | | | | | | | | | | |
| Attendance charged for the following days: | | | | | | | | | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | | | |
| 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | | | |
| 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | | | |
| 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | | | | |
| Total number of days, —, at \$3. | | | | | | | | | | | | |

—, 189—.

Received from —, United States Marshal, the sum of
— dollars, amount in full due me as above stated.

No. 2315.**Schedule of Fees.(1)**

The United States } The District Court of the United States,
 vs. } _____ District of _____.
 _____ } Charge _____.

| | | | | |
|--|--|--|--|--|
| Amount brought forward, Warrant issued by _____, U. S. commissioner at Columbus, O., Arrested at _____, by deputy _____, Before _____, U. S. commissioner at _____ Attended by deputies _____, Mileage from _____ to place of arrest, _____ miles, at 6 cents, Mileage for deputy in charge of prisoner, _____ miles, at 10 cents, Mileage for prisoner, _____ miles, at 10 cents, Mileage for guard, _____ miles, at 10 cents, Support of prisoner while in custody, Expenses endeavoring to arrest _____, _____ days, at \$2, Bail bond to _____ trial by U. S. _____, For discharge of prisoner, Service of warrant of commitment to _____ jail, for _____ trial _____ by U. S. court _____ commitment, Mileage from _____ to jail for deputy, pris- oner, and _____, guard, _____ miles each, _____ miles, at 10 cents, Serving subpoenas at _____, on _____, Amount carried forward, Voucher No. _____. Sheet _____. | | | | |
|--|--|--|--|--|

(1) See R. S. U. S., Sec. 829. Clerks, marshals and district attorneys are all now on salaries by Act of Congress, but of course that fact does not dispense with fee statements.

No. 2316.**Certificate for Wages of Guard of Prisoner.**

The United States of America,
 — District of —.

—, —, 189—.

I hereby certify that I have been employed and have acted — days as a guard over —, a United States prisoner, in charge of —, deputy marshal, from — to —, being a distance of — miles.

(Name of guard) —,

(Post-office address) —.

(Name of witness) —.

(Post-office address) —.

No. 2317.**Account Current U. S. Marshal.**

Abstract of Fees and Expenses of —, Deputy United States Marshal for the — District of —, from —, 189—, to —, 189—:

| | | |
|-------------------|-----------|------|
| Subvoucher No. 1, | | \$ — |
| Subvoucher No. 2, | | — |
| Subvoucher No. 3, | | — |
| Subvoucher No. 4, | | — |

— District of —, ss.

—, deputy United States marshal for said district, being duly sworn, deposes and says that the services stated in the vouchers mentioned in the foregoing abstract, and which are thereunto attached, have been rendered in good faith, as therein stated; that the expenses charged therein were necessary, and have been paid, and that all the items charged are correct and legal, as he verily believes.

Sworn and subscribed this — day of —, 189—, before me.

—,
 Dep. U. S. Marshal.

No. 2318.

Deputy Marshal's Report in Criminal Case, before
United States Commissioner.

_____, _____, 189-.

United States Marshal, _____, _____:

Sir: Below find report of my services, etc., in the case of the United States *vs.* _____, charged with _____, on affidavit of _____.

On _____, 189-, warrant was issued by _____, U. S. commissioner at _____, _____, and received by me on _____, 189-, at _____, _____.

I arrested the defendant on _____, 189-, at _____, in _____ county (1), _____, and took _____ before _____, U. S. commissioner at _____, _____. _____ (2).

I employed _____ as guard over the prisoner, who traveled from _____ to _____, a distance of _____ miles.

On _____, 189-, defendant _____ was produced before Commissioner _____, and in default of bail committed to _____ county jail, for hearing, [*or say*, released on bail for appearance before said commissioner].

I executed warrant of commitment on _____, 189-; distance to jail, _____ miles.

On _____, 189-, Commissioner _____ issued a subpoena for U. S. witnesses, which I served _____, 189-, on (3) _____, and _____, 189-, on (3) _____.

In serving subpoena I traveled from _____ to _____ to serve most distant witness, being _____ miles, and from _____ to _____ to serve other witnesses, being _____ miles; total, _____ miles. This travel is exclusive of that on warrant.

On _____, 189-, I took defendant before Commissioner _____, and a _____ examination of the charge was had, after which defendant, _____, remanded into custody [*or say*, released on bail], for _____.

I executed warrant of commitment to _____ county jail, for trial at _____ court, on _____, 189-. Distance to jail from commissioner's office _____ miles.

I employed — as guard over prisoner; guard traveled from — to —, a distance of — miles.

My expenses in this case were as follows:

In traveling to execute warrant, from receipt of writ to time of arrest (state dates and items), —.

In transporting prisoner to the commissioner's office (state dates and items), —.

For subsistence of prisoner (state dates and items), —.

In transporting prisoner to jail on temporary warrant of commitment, —.

In transporting prisoner from jail to commissioner's office for hearing (dates and items), —.

In transporting prisoner to jail on warrant of commitment for trial (dates and items), —.

For subsistence of prisoner en route to jail (dates and items), —.

In traveling to serve subpoena (dates and items), —.

—,
Dep. U. S. Marshal.

(1) When an arrest is made at a point distant from a town or post-office, the name of nearest post-office and distance therefrom must be stated.

(2) If prisoner is taken before any other commissioner than the one before whom warrant was made returnable, the reason therefor must be given.

(3) State *places* of service, as well as names of witnesses served.

No. 2319.

Deputy Marshal's Report to the United States Marshal.

Deputy Marshal's Report in — Case,
before the — Court of the United States,
for the — District of —.

United States Marshal, —. —, 189—.

Sir: Below find report of my services, etc., in the case of
— vs. —.

(2) —.

On —, 189—, writ of (3) — was issued out of said court at —, returnable on — day of —, 189—, at —.

I received said writ on the — day of —, 189—, at —, and served it as follows: On (4) —, at —, in — county, and on (4) —, at —, in — county.

The distance traveled to serve said writ on most distant person was — miles, and the additional travel to serve others, — miles; total, — miles.

On —, 189—, a warrant was issued at —, for the removal of defendant from — to — for trial. I received this writ on —, 189—, at —, and executed it on —, 189—, by delivering the defendant into the custody of —, at —. In going to serve this writ I traveled from — to —, — miles; and the distance traveled in transporting prisoner was — miles.

I employed — as a guard over prisoner, who traveled from — to —, — miles, as per his certificate herewith.

On —, 189—, a writ of attachment for witness in contempt was issued at —. I received said writ at —, on the — day of —, 189—, and served it as follows:

On (4) —, at —, in — county.

In going to serve said writ I traveled from — to —, a distance of — miles.

In transporting witness to court at — the distance traveled was — miles; I employed — as a guard over the witness, who traveled from — to —, a distance of — miles, as shown by his certificate herewith.

The witnesses were brought into court on —, 189—, and (5) — on —, 189—, a warrant of commitment to — was issued out of said court at —. I received this writ on —, 189—, at —, and executed it on —, 189—, by delivering the defendant into the custody of the warden of said prison, at —.

In transporting defendant on this writ a distance of — miles was traveled.

I employed — as a guard over prisoner, who traveled from — to —, — miles, as per his certificate herewith.

My expenses in this case were as follows:

On writ of — (state dates and items):—.
 On warrant of removal (dates and items):—.
 Meals furnished prisoner (dates and items):—.
 On attachment for witnesses (dates and items):—.
 Meals furnished witnesses (dates and items):—.
 On warrant of commitment (dates and items):—.
 Meals furnished prisoner (dates and items):—.

_____,
 Deputy United States Marshal.

- (1) Deputies will use this form in reporting Service of Court Process in either criminal or civil cases.
- (2) If a criminal case, note here the charge or indictment.
- (3) "Subpœna," if a criminal case, or "summons," "chancery subpœna," etc., if civil.
- (4) Dates of services and names of persons served with writ.
- (5) "Discharged from custody," or "committed," as the case may be.

No. 2320.

Schedule of Fees for Deputy Marshals.

The United States of America,

To —, U. S. Marshal, Dr.,

For services rendered by his Deputy, —, in the following Criminal Cause, to wit:

189- { The United States } Charge: —.
 vs.

Warrant issued by —, United States Commissioner at —, on affidavit of —, received at — on the — day of —, 189-. Executed by arresting the defendant at —, in — county, — miles from —, and taking — before —, United States Commissioner at —, — miles from the place of arrest, on the — day of —, 189-.

| EXPENSES INCURRED WHILE ENDEAVORING TO ARREST DEFENDANT, VIZ.: | | | | | | | DOLLARS. | CENTS. |
|--|----------------|---------------|-------------------|--|--|--|----------|--------|
| DATE. | R. R. FARE. | TEAM HIRE. | SUBSIS- TENCE. | | | | | |
| — days. Total expenses, \$— Amt. chargeable to the United States not exceeding \$— for each day. | | | | | | | | |
| Arrest | | | | | | | | |
| — miles going, at 6 cents | | | | | | | | |
| — miles returning, self and prisoner, at 10c. each | | | | | | | | |
| — miles returning, guard, at 10c. | | | | | | | | |
| — meals for prisoner, at | | | | | | | | |
| Warrant of commitment for temporary con- finement issued by commissioner — | | | | | | | | |
| Executed by delivering defendant to jailer of — county, at — | | | | | | | | |
| Serving warrant, \$2.00. Committing defend- ant, at 50c. | | | | | | | | |
| — miles to jail, self and pris. at 10c. each | | | | | | | | |
| — miles, jail to commissioner's office and return, self and prisoner, at 10c. each | | | | | | | | |
| Discharge on bail bond | | | | | | | | |
| — days attendance as officer before com- missioner — | | | | | | | | |
| Subpoena issued by commissioner —, for U. S. witnesses | | | | | | | | |
| Served on — at —, — miles from —, and on —, — miles from —, and on —, — miles from — | | | | | | | | |
| — services at 50c. | | | | | | | | |
| — miles going, at 6c., in addition to mile- age charged above, on warrant | | | | | | | | |
| Warrant of commitment for trial at — term 189—, issued by commissioner — | | | | | | | | |
| Executed by delivering deft. to jailer of — county, at — | | | | | | | | |
| Serving warrant, \$2.00. Committing deft. at 50c. | | | | | | | | |
| — miles to jail, self and prisoner, at 10c. each | | | | | | | | |
| — miles guard over prisoner, at 10c. | | | | | | | | |
| — meals for prisoner en route to jail | | | | | | | | |
| Discharging defendant when case fails | | | | | | | | |
| Total, | | | | | | | | |

The United States of America,

— District of — ss.

—, Deputy United States marshal for said district, being duly sworn, deposes and says that the services stated in the foregoing account have been rendered in good faith, as therein stated; that the expenses charged therein were necessary, and have been paid, and that all the items charged are correct and legal, as he verily believes.

Sworn and subscribed this — day of — 189—, before me.

—,
Deputy United States Marshal
for the — District of —.

No. 2321.

Affidavit of Salaried Officer of the Government for Actual Expenses.

The United States of America,

To —, Dr.

For expenses incurred in attending the — term, 189—, of the — court of the United States, at the city of —, as a witness on behalf of the government in the case of the United States *vs.* —, as follows:

| | | | | |
|-----|--|------------------------------------|--|----|
| 189 | | | | |
| | | Fee for affidavit to this account, | | 25 |
| | | Total, \$ | | |

The United States of America,

— District of —, ss.

Before me, personally appeared the above-named —, who, being duly sworn according to law, deposes and says that he is a salaried officer of the government, to wit, —;

that in obedience to a subpoena issued out of the court above stated, he necessarily incurred the expenses above set forth for travel and subsistence, and that by the regulations of the —, in which he is employed he is not entitled to receive and has not received, and will not claim therefrom, any allowance whatever for the same.

Sworn and subscribed this — day of —, 189—, before me.

No. 2322.

Voucher for Fees and Expenses of Deputy Marshal.

Subvoucher, No. —.

The United States of America,

To —, United States Marshal, Dr.

For fees and expenses of Deputy — in the following case, viz.:

| | | |
|-------------------|---|--------------------------------------|
| The United States | } | In the — Court of the United States, |
| <i>vs.</i> | | for the — District of —, issued at |
| — | | —, 189—, —; Ret. at —, 189—; |
| —. | | Rec'd by Dep. at —, 189—; Served |
| | | as follows: |

| 189 | On | |
|-----|----|--|
| | — | services, at — |
| | — | miles, going only from — |
| | | to — at 6c. |
| | — | miles, extra travel from — |
| | | to — at 6c. |
| | | Actual expenses charged in lieu of mileage, viz. |

ADDITIONAL FORMS IN BANKRUPTCY

No. 1559a.

Certificate of Proceedings at First Creditor's Meeting.

At a Court of Bankruptcy, held in and for the Eastern Division of the Southern District of —, at —, on the — day of —, 19—.

Present, —, Esquire, referee.

[*Caption.*]

This being the day appointed by the court for the first meeting of creditors in the above entitled proceeding in bankruptcy, and due notice thereof having been given by publication in the — and also by mail for ten days, the undersigned referee in bankruptcy for said court sat in accordance with said notice to take proofs of debt, to choose a trustee, to examine the bankrupt and for the discharge of any and all other business proper to be transacted at such meeting; accordingly said referee certifies that the following is a list of creditors whose claims were proved at said meeting and their respective amounts, namely— and said claims having been found in all respects correct were upon proper motion allowed as set forth, except [here note excepted claims and reasons for their postponement].

Said referee further certifies that all the creditors present at said meeting whose claims were allowed are as follows — and that the majority in number and amount of the creditors whose claims were proved and who were present or duly represented by agents or attorneys chose — of — to be trustee of said bankrupt's estate and effects and fixed his bond at \$—, and said appointment of said — as trustee being deemed proper in all respects is hereby approved:

It is hereby ordered that said meeting be adjourned [here state to what time or indicate the purpose, if any].

—,
Referee.

No. 1559b.**Preliminary Valuation of Secured Claim.**

[*Venue and caption.*]

At the first meeting of creditors in said proceeding in bankruptcy — presented a secured claim for allowance and upon examination thereof and the securities thereto appertaining the value of said securities appeared to be — and the claim appeared to be — in excess of said securities, and these amounts were preliminarily accepted for the purpose of participation in creditor's meetings prior to the final determination of claims, and it is accordingly ordered that said claim be and it is hereby allowed for said mentioned purpose, in the sum of \$——.

_____,
Referee.

No. 1627a.**Final Order for Distribution.**

[*Venue and caption.*]

The trustee, —, in this proceeding in bankruptcy, having filed his final report and account herein, and due notice thereof having been given and of a final meeting of creditors to pass upon said account and of the declaration and time of payment of a last dividend in said proceeding, and no objection having been made thereto,

Upon motion of said trustee it is hereby ordered,

That the final account of said trustee is hereby approved.

That said trustee, for expenses of administration, as set out, disburse \$—— which sum is hereby allowed, and that the amount of \$—— be retained in his hands to pay the expense of such disbursement.

[Then follow with items of attorneys' fees for bankrupt and for trustee, of dividends, if any, etc., provide for discharge of bondsmen, etc., as the facts may justify.]

_____,
Referee.

No. 1629a.**Order Declaring First Dividend and Ordering Payment.**

[Venue and caption.]

Upon application for the declaration of a first dividend and notice thereof of not less than — per centum, on the report of the trustee — herein, and no objection thereto having been made, and it appearing from said report that such dividend will not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as will probably be allowed,(1)

Upon motion of said trustee it is ordered

That a dividend of — per centum be and the same is hereby declared on all claims not entitled to priority allowed herein, according to a dividend statement hereto attached.

[If any priority claims have been allowed and not paid, the order should provide for their payment.]

That said trustee forthwith make payment of said dividend as ordered herein.

—,
Referee.

(1) See Bankruptcy Act, Sec. 65, as amended by Act of February 5, 1903.

No. 1639a.**Petition for Leave to Abandon Burdensome Property.(1)**

[Venue and caption.]

Petitioner shows that he is the duly elected, qualified and acting trustee herein; that a portion of said bankrupt's estate consists of the following property, to wit — and that upon investigation of the value thereof said trustee finds that said property is encumbered beyond its value as follows — and is therefore burdensome to the said trustee; accordingly said trustee represents that it would be for the benefit of said estate if he were instructed to disclaim title to the said property,

Wherefore petitioner prays that an order may be issued herein instructing him to disclaim all title to said property and to refuse to take the same into his possession.

_____,
Trustee.

(1) This is not specifically touched upon in the act but is a matter clearly within the discretion of the court.

No. 1647a.

Petition to Compromise Disputed Claim and the Like.

[*Venue and caption.*]

The trustee in the above proceeding in bankruptcy shows to the court that the claim of the said estate against one X, of the following nature, _____, is in dispute but that said X has submitted a proposal to compromise the same as follows _____; your petitioner shows that it is for the best interest of said bankrupt estate to settle said claim upon that basis, for the following reasons _____.

Wherefore petitioner prays for an order directing that the said disputed claim be compromised as herein set forth and approving said compromise.

[*Verification.*]

_____,
Trustee.

No. 1663a.

Petition for Reclamation of Property.

Entitle in the proper District Court.

[*Caption.*]

To the Honorable District Court of the _____ District of _____,
_____ Division:

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the state of _____ and having its chief office and place of business at _____ in said state [*or is a*

firm or individual], and shows to your honor and alleges as follows:

1. That at all the times hereinafter mentioned said bankrupt — was engaged in business in —;

2. That heretofore and on the — day of —, 19—, an involuntary petition in bankruptcy was filed in the office of the clerk of said court, praying that the said — be adjudged an involuntary bankrupt, and that thereafter — was duly appointed receiver in bankruptcy of the said —, and that in pursuance of the said appointment he took possession of and continues to hold the property mentioned and described in the schedule hereto annexed and marked "Exhibit A—Schedule," and that said property is identified as shown in said exhibit and is of the value of —;

3. That before the commencement of this proceeding demand was made by your petitioner upon said receiver for the delivery of the property in said exhibit mentioned to your petitioner, but that said demand was and is refused;

4. That the time the said property was delivered to the said — by your petitioner the said — was insolvent and unable to pay his debts in full as he well knew, and made false and fraudulent representations with intent to cheat and defraud petitioner, and hereupon induced petitioner to sell and deliver the said property with the intent not to pay therefor when the term of credit thereof should expire, and petitioner relied upon said representations and — knew that petitioner so relied thereon in making said sale and delivery;

5. That said false and fraudulent representations are as follows:

Heretofore and on the — day of —, 19—, the said —, bankrupt, did refer to and adopt as his own a statement of his financial condition at page — of the — Commercial Agency Reports for —, 19—, according to which statement his liabilities amounted to the sum of \$— and his property over and above all debts and liabilities amounted to the much

larger sum, namely \$——; and a copy of said statement is hereto attached and marked "Exhibit B—Statement";

6. That said —— bankrupt, did refer to and adopt said statement for the purpose of obtaining credit, and that petitioner relied upon the truth of the representations therein contained; that said representations were false and untrue, in that his liabilities greatly exceeded the liabilities in said statement shown and were greatly in excess of the value of his entire property in said statement mentioned, and he did not have a surplus over and above his liabilities, but was in fact insolvent at the time and was well aware thereof;

Wherefore petitioner prays that the said ——, receiver, be directed to deliver to petitioner the said property set out in said "Exhibit A—Schedule," and in that behalf avers its readiness and willingness to execute and file such bond as to this honorable court may seem meet and proper; and petitioner prays for such other and further relief as to this honorable court may seem proper in the premises.

Date ——.

——,
By ——,
President.

Attorneys for Petitioner.

[Address] ——.

[*Verification.*]

No. 1198a.**Affidavit for Search Warrant under National Prohibition Act. (1)**

United States of America,
— District of —,
— Division, ss.

Be it remembered that on this day, before me the undersigned, a United States Commissioner for the — District of —, and the — Division thereof, came —, who, being by me duly sworn, deposes and says that the laws of the United States, namely, the National Prohibition Act, 41 Statutes at Large, page 307 and following pages, are being violated by reason of the facts, to-wit: _____

_____ being the premises of — and being situate in the — of — and the State of —, within the above district.

Sworn to before me and subscribed in my presence this — day of —, 19—.

(Seal) _____, United States Commissioner as Aforesaid.

This cause coming on for hearing on the application for a search warrant supported by the affidavit above set forth, —, the undersigned commissioner, thereupon being satisfied that there is probable cause to believe that the grounds set forth in said application and affidavit exist, and that the law is being violated as charged, does hereby so find.

_____,
United States Commissioner as Aforesaid.

(1) See 41 Stat. L. 307 et seq., and 40 Stat. L. 228, for the legal requirements of the search warrant and the supporting affidavit.

No. 1199a.**Search Warrant under the National Prohibition Act.(1)**

United States of America,
—— District of ——,
—— Division, ss.

To ——, Internal Revenue Officer of the United States for the —— District of ——, and to his deputies, or any of them, and to ——, Federal Prohibition Agent:

Whereas, complaint on oath and in writing, supported by affidavit, has this day been made before me, ——, a United States Commissioner for the said district, by ——, alleging that the laws of the United States, namely, the National Prohibition Act, 41 Statutes at Large, page 307 and following, have been and are being violated by unlawfully———

being the premises of —— and being situate in the —— of ——, and State of ——, and within the district above named;

You are therefore hereby commanded, in the name of the President of the United States, to enter said premises in the day time or the night time, with the necessary and proper assistance, and there diligently to investigate and search into and concerning said violations, and to report and act concerning the same as required of you by law.

Given under my hand and seal on this —— day of ——, 19——.

(Seal)

——,
United States Commissioner as Aforesaid.

(1) 41 Stat. L. 307 and 40 Stat. L. 228.

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